



Cornography: Perverse Incentives and the United States Corn Subsidy

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**Cornography: Perverse Incentives and
the United States Corn Subsidy**

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April 2011

This paper is being in satisfaction of both the winter 2010 semester of Food and Drug Law
and the third year written work requirement.

Abstract: U.S. corn subsidies alter incentives for corn growers, agricultural producers, and the manufacturers of countless corn-based products. The ripple effects of these changed incentives contribute to a range of environmental problems, increase domestic healthcare costs, and create distortions in international food and labor markets. Despite mounting political opposition, U.S. regulators and legislators have proven unwilling to confront these externalities and continue to actively fund subsidies Farm Bill after Farm Bill. The persistence of these policies can only be properly understood when viewed in the context of the incentives and structural constraints facing policymakers themselves.

This paper attempts to understand both the mechanisms through which the corn subsidy alters incentives and the mechanisms through which corn subsidy legislation is reproduced decade after decade. The paper begins with a historical overview of American agricultural legislation and attempts to elaborate the ways that the impact of the U.S. subsidy systems radiates throughout the economy. Lastly, the paper attempts to analyze the incentives and constraints on legislators and regulators that have produced the distorted incentive structures of American food policy as reflected in the corn subsidy.

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Introduction

Among the most important functions we have afforded to Congress is the power to reshape social and economic incentive structures through legislation. Proceeding from its Commerce Clause authority and using a complex toolbox of legislative and regulatory innovations, the federal legislature has enormous power to transform the types of behavior that people will perceive as self-interested throughout our economy and thus how those same people are likely to act. Congress can, among other things, design new forms of criminal and civil liability, establish entitlement systems, subsidize industries, encourage behavior through the tax code, regulate interactions among producers and consumers, set market ground-rules, and limit the scope of permissible activity.

As Congress uses these tools to alter incentives, new market configurations emerge, and interests shift, often in unanticipated ways. Even minor changes in incentives can have enormously magnified effects as parties respond to new rules and changed price signals. Given the dynamic nature of our economy, legislation designed to target one problem inevitably causes unexpected changes in other places. The “law of unintended consequences,” as Robert Merton phrased it,¹ is among the primary reasons that legislation is and must remain a highly iterative process, open always to improvement and reconfiguration in light of new information. Doubtless some entities develop an interest in the preservation of the status quo, but in a representative democracy, we would expect that only those policies whose consequences correspond to the demands of the broader public would remain in effect over time. The system of corn subsidies provides an instructive, if not nightmarish, example of the unintended consequences that legislated incentive

¹ Rob Norton, Unintended Consequences. Library of Economics and Liberty (2008), available at <http://www.econlib.org/library/Enc/UnintendedConsequences.html> (last visited April 6, 2011)

structures can produce when not regularly reevaluated and highlights the processes that are preventing that reevaluation from taking place.

Initially created in the 1930s to stabilize agricultural prices during the Great Depression, agricultural subsidies and price supports have since turned food production markets upside down. Rather than aiding family farmers, the subsidy system now in place primarily benefits large commercial growers and gives farmers the incentive to grow no matter how much corn is already on the market. The secondary effects—such as overstimulating HFCS, ethanol, and factory-farmed meat production—only scratch the surface of the farm bill’s impact. By paying large subsidies out of the U.S. tax base, Congress is funding preventable environmental degradation, deepening our fossil-fuel dependence, accelerating America’s obesity and diabetes epidemics, and contributing billions of dollars to annual healthcare costs. Internationally, American subsidies have upset commodity prices, pushed countless farmers out of work, fueled political instability, and even promoted farm-labor immigration into the United States. In short, the U.S. Farm Bill redraws markets and warps incentives far beyond the domestic market in grain and corn. And, as Michael Pollan wrote regarding the bill, “the nation’s agricultural policies operate at cross-purposes with its public health objectives.”²

Congress and the USDA also face incentives of their own, and the legislation they produce reflects that fact. These incentives, however, have become interlinked with the private sector interests Congress is entrusted with regulating, offering perhaps the most cogent explanation for why these harmful policies remain in place. The American citizenry continues to bear the ultimate costs and risks associated with of bad and politically

² Michael Pollan, “You Are What You Grow,” in *MANIFESTOS ON THE FUTURE OF FOOD & SEED*, ed. Vandana Shiva, South End Press, Cambridge, MA at 135 (2007).

unassailable policies in the form of direct tax expenditures, increased energy prices, skyrocketing obesity rates, higher healthcare costs, and shorter lives, but it remains unable to get that message across to its elected representatives. Corn subsidies are testament to the failures of our legislative system and difficulties inherent in the public-private divide. As long as incentives for legislators are linked with narrowly-conceived industrial interests, the only institution capable of recalibrating agricultural policy is likely to remain unwilling to address the environmental and healthcare problems now confronting our country, even those we actively prop up through policies like the corn subsidy. In the short-term, interest groups should respond to the new political ecosystem, but eventually Congress must somehow come to terms with its own corrosive conflicts of interest.

This paper highlights several broad effects of America's agricultural policies, with particular emphasis on the distortive impact that corn subsidies have beyond America's food supply, on areas such healthcare costs, the environment, and international commodity markets. This paper also seeks to identify the structural mechanisms through which corn subsidies have managed to persist as a federal policy despite considerable political opposition, with specific attention given to the incentives facing legislators and regulators.

Section I provides a brief historical account of corn subsidies and related agricultural regulations. Section II examines the current administration of federal corn subsidies; the incentives that subsidies create for corn growers, food producers, manufacturers, and consumers; and several salient healthcare and environmental costs these subsidies have imposed. Section III examines those features of our federal political landscape that make effective legislation and regulation in this area such a formidable challenge. Finally, I conclude with the observation that restoring reasonable price signals in

our food system will require us to move away from deficiency payment systems—and that getting there will require us to confront deeper structural problems with the way agricultural legislation is passed and implemented.

I. A Short History of Agricultural Subsidies and Related Legislation

The current farm payment system in the United States is only intelligible viewed in its historical context—as the accumulation of decades of incremental legislation. This Section provides a brief overview of major federal agricultural legislation and subsidies programs, with particular attention given to the social and political conditions that shaped these bills. This Section begins with an early history of agricultural regulation, followed by a brief summary of subsidies introduced during the New Deal and WWII, and concludes with a short history of agricultural legislation since late 1940s and the emerge of the multi-year farm bill. Historically, federal agricultural legislation was concerned with three overarching objectives: protecting family farms, increasing agricultural output, and insulating grain markets from both market and weather-related shocks. It is significant that the Farm Bill is only recently being reexamined in light of its impact on the environment and domestic healthcare costs.

A. An Early History and Several Themes of Agricultural Regulation

Since America's founding, cries to preserve small family farms have been a regular voice in national policy debates, often even in matters extended beyond merely agricultural concerns. The independent and self-sufficient farmer, connected to the land and informed by deep-rooted traditions, is a persistent image of American identity and remains central to

a number of continuing ideological debates.³ The Jeffersonian agrarian republic invoked the starkly autonomous farmer, and Jefferson placed the independent agrarian citizen at the center of his entire political ideology. Into the nineteenth century, the image of the self-sufficient farmer helped energize legislation such as the Homestead Act, which granted public lands to settlers who agreed to live on and develop land outside the original thirteen colonies for five years.⁴ Lincoln, in his final address to Congress, famously referred to the USDA as the “people’s department.”⁵ As in the Congressional response to the Great Depression, protecting family farmers was often one explicit justification for agricultural legislation.⁶ Even as technological innovation and commercialization transformed the farming into an industrial practice, this rhetoric has retained political currency and continues to frame agricultural debates to the present.⁷

Early agricultural legislation focused on ways that scientific and technological advancements could increase productivity and output. The 1862 creation of the United States Department of Agriculture (USDA) and the Morrill Land Grant College Act, for instance, emphasized the adoption of new technological methods and sought to foster

³ See, e.g., William Pike, *Raw Milk and the Sour State: Control of the Milk Supply is a Primary Step toward Government Control of the Larger Food Supply*, *The Freeman Ideas on Liberty* Vol. 59, Iss. 1 (Jan./Feb. 2009) (“One must ask if the many citizen-farmers who valiantly fought for liberty two centuries ago could have ever envisioned a “free” state in which one citizen would be legally barred from selling milk from his cow to another citizen. Even King George III would have laughed at that idea.”).

⁴ Dennis Keeney, Inst. for Agric. & Trade Pol’y & Loni Kemp, *The Minnesota Project, A New Agricultural Policy for the U.S.* 6 (2003), available at <http://www.mnproject.org/publications/New%20Agricultural%20Policy%20for%20the%20US.pdf>.

⁵ USDA Release No. 0042.09, Vilsack Establishes the People’s Garden Project on Bicentennial of Lincoln’s Birth: Announces goal of creating community gardens at each USDA facility worldwide, Feb. 12, 2009, available at <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2009/02/0042.xml>.

⁶ See Senate Doc. 105-24, Chapter 4: Crisis and Activism: 1929-1940, *The United States Senate Committee on Agriculture, Nutrition, and Forestry 1825-1998*. U.S. Government Printing Office, Washington, D.C. 1998.

⁷ See, e.g., Stanley Fishman, *Protect Family Farms! Save Food Freedom!*, Nov. 18, 2010, available at <http://www.tendergrassfedmeat.com/2010/11/19/protect-family-farms-save-food-freedom/>; Thomas Richard Poole, *Silly Rabbit, Farm Subsidies Don't Help America*, 31 *Wm. & Mary Env’tl. L. & Pol’y Rev.* 183 (Fall 2006).

cooperation between farmers and land-grant universities.⁸ Similarly, the Smith-Lever Act of 1914 formed an official partnership between land-grant universities and the USDA, known as the National Institute of Food and Agriculture (NIFA).⁹ This Act established a system whereby land-grant universities received federal funds to invest in agricultural education and extension work, while NIFA helped ensure those funds were spent in accordance with USDA priorities.¹⁰ With the full support of Congress and the USDA, technological advancements enabled massive increases in productivity, leading to consolidation and larger farm operations. Ironically, while public rhetoric surrounding agricultural policy often invokes the family farmer,¹¹ federal policy has proven unable to stave off commercial farming and the decline of the family farm.¹² In fact, as Brian Riedl of the conservative and libertarian Heritage Foundation described in a New York Times online discussion, “Setting aside the Norman Rockwell imagery, farm subsidies are America’s largest corporate welfare program.”¹³

Another recurring objective of U.S. agricultural legislation has been the need to insulate farmers and the food supply from excessive uncertainty created by both seasonal weather fluctuations and economic instability. During World War I, for instance, NIFA

⁸ See e.g. Marcus Brown, *The Morrill Land-Grant Act of 1862 and Foundations of the University of Kentucky*, (Frank Stanger, ed.), University of Kentucky Special Collections, available at http://www.uky.edu/Libraries/libpage.php?lweb_id=336&llib_id=13.

⁹ History of U.S. Agricultural Extension, USDA National Institute of Food and Agriculture (NIFA), available at <http://www.csrees.usda.gov/qlinks/extension.html> (Last Updated: Mar. 22, 2010).

¹⁰ *Id.*

¹¹ See, e.g. Chuck Hassebrook, *Cap the Subsidies to Big Farms*, *The New York Times*, Room for Debate, Nov. 21, 2010, available at <http://www.nytimes.com/roomfordebate/2010/11/21/do-farm-subsidies-protect-national-security/put-a-cap-on-subsidies-to-big-farms>. (“Many Democrats who wrap themselves in rhetoric about saving the little guy are equally timid when it comes to reigning in mega-farm subsidies.”).

¹² Keeney, D. and L. Kemp. *How to Make it Work: Required Policy Transformations for Agroecosystem Restoration*. Presented at the 89th Annual Meeting of the Ecological Society of America, Portland, Oregon, 1–6 (August 2004).

¹³ Brian Riedl, *Who Eats Cotton Anyway?*, *The New York Times*, Room for Debate, Nov. 21, 2010, available at <http://www.nytimes.com/roomfordebate/2010/11/21/do-farm-subsidies-protect-national-security/who-eats-cotton-anyway>.

sought to address war-related farm labor shortages by expanding the acreage used to grow wheat and implementing new USDA production and food conservation policies.¹⁴ Following the war, in an effort to stabilize grain prices and prevent market manipulation, Congress passed the 1922 Grain Futures Act, which placed restrictions on exchanges in grain futures by establishing a regulated exchange and created a number of disclosure requirements.¹⁵ This Act was later replaced by the Commodity Exchange Act, which regulates the exchange of broader categories of commodities options and futures without singling out agricultural commodities.¹⁶ This rationale for regulating the agricultural sector become particularly acute during the early 1930s, when severe droughts and prolonged economic recession threatened to disrupt the food supply, put hundreds of thousands of farmers out of work, and send grain prices spiraling out of control.

For at least a century now, another fixture of the U.S. food agricultural regulatory systems has been its highly balkanized structure. Responsibilities are split between the USDA, the Food & Drug Administration (FDA), the Environmental Protection Agency (EPA), and numerous other state and federal agencies. All told, food safety system alone is “composed of fifteen federal agencies that work under thirty foundational statutes.”¹⁷

¹⁴ Id.

¹⁵ US Futures Trading and Regulation Before the Creation of the CFTC, History of the CFTC, United States Commodities and Futures Trading Commission, available at http://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html; see also Investopedia Financial Dictionary: Grain Futures Act of 1922, available at <http://www.answers.com/topic/grain-futures-act-of-1922>.

¹⁶ Id.

¹⁷ *Reforming the Food Safety System: What if Consolidation Isn't Enough?*, 120 Harv. L. Rev. 1345 (2007) (Citing Inst. of Med., Nat'l Research Council, *Ensuring Safe Food: From Production to Consumption* 85 (1998); U.S. Gen. Accounting Office, GAO-05-549T, *Overseeing the U.S. Food Supply: Steps Should Be Taken To Reduce Overlapping Inspections and Related Activities* 1 (2005); see also U.S. Gen. Accounting Office, GAO-04-588T, *Federal Food Safety and Security System: Fundamental Restructuring Is Needed To Address Fragmentation and Overlap* 18 (2004) (noting that several former high-ranking food safety officials support the consolidation of food safety activities); Donna U. Vogt, *Food Safety: Recommendations for Changes in the Organization of Federal Food Safety Responsibilities, 1949-1997* (1998), reprinted in Inst. of Med., Nat'l Research Council,

Extensive balkanization introduces collective action and coordination problems and makes legislating and regulating in this area more difficult.¹⁸ In the context of subsidies, farm bills and the related authorizing statutes often limit agency discretion, making it burdensome or impossible for an agency like the USDA, for example, to take healthcare costs or environmental factors into account in determining how subsidy payments could more effectively be allocated.¹⁹ Although some commentators have pointed out the benefits of regulatory specialization, fragmentation has been a recurring source of criticisms since the USDA and FDA were first separated in 1940.²⁰ These criticisms have taken slightly different forms but have persisted throughout the history of agricultural regulation. Many of these concerns are discussed more thoroughly in Section III, Part A below.

B. Agricultural Policy through the Depression, the New Deal, and World War II

The first large-scale direct subsidies were established as a response to unstable economic conditions in the agricultural sector caused by the Great Depression and the 1930s Dust Bowl. These payment programs were meant to provide welfare-like support to

Ensuring Safe Food: From Production to Consumption 85, app. B at 115 (1998); see also Stuart M. Pape et al., *Food Security Would Be Compromised by Combining the Food and Drug Administration and the U.S. Department of Agriculture into a Single Food Agency*, 59 Food & Drug L.J. 405, 405 (2004) (“There is a recurring debate in Washington, D.C., regarding the necessity of combining the food regulatory functions of the Food and Drug Administration...and the meat and poultry regulatory functions of the U.S. Department of Agriculture...into a single food agency...FDA practitioners have long viewed this debate as never-ending and virtually immune to outside forces and the vagaries of the political process.”); Press Release, Center for Science in the Public Interest, *Too Many Chefs in the Food-Safety Kitchen?*, (Oct. 7, 2004), available at <http://www.cspinet.org/new/200410071.html> (discussing legislation that would have combined the USDA and the FDA)).

¹⁸ See generally, Frederick J. Lee, *Global Institutional Choice*, 85 N.Y.U. L. Rev. 328 (2010).

¹⁹ See Geoffrey S. Becker, “Farm Commodity Programs: A Short Primer,” CRS Report for Congress, updated June 20, 2002 (discussing the scope of USDA statutorily required support programs and USDA Discretionary Support programs under Section 32 of P.L. 320, a 1935 law).

²⁰ See, e.g. Helena Bottemiller, GAO: Food Safety Fragmentation Needs to be Fixed, Food Safety News, (Mar. 21, 2011) (summarizing a recent report by the U.S. Government Accountability Office noting Opportunities to Reduce Potential Duplication in Government Programs. The GAO report and press release are available here: http://www.gao.gov/ereport/GAO-11-318SP/data_center/Agriculture/Fragmented_food_safety_system_has_caused_inconsistent_oversight_ineffective_coordination_and_inefficient_use_of_resources).

farmers and to prevent food prices from entering a deflationary spiral.²¹ Farmers were among those hardest hit by the depression, and at the time, over 20% of the American workforce was engaged in agricultural employment.²² Under President Hoover, Congress passed the Agriculture Marketing Act of 1929 and established the Federal Farm Board, which was authorized to lend to farmers and to purchase surplus crops in order to stabilize prices.²³ Despite injecting a number of \$500 million dollar payments into the agricultural sector, this bill was unable to stop crop prices from falling.

As crop prices continued to fall through the early 1930s, farmers grew additional crops to compensate for lost earnings, which led to further surpluses and drove the price of crops lower still. Congress reacted by passing two major agricultural bills as part of FDR's New Deal broader New Deal efforts to stabilize markets and stop this downward price cycle. The Commodity Credit Corporation (CCC) was given its federal charter in 1933 and authorized to buy, sell, lend, and make payments in order "to stabilize, support, and protect farm income and prices."²⁴ Congress also passed the Agricultural Adjustment Act of 1933, which created the Agricultural Adjustment Administration (AAA) and established subsidies for farmers who left their land fallow.²⁵ These subsidies were designed to reduce crop

²¹ See Cynthia Clark Northrup, *THE AMERICAN ECONOMY: A HISTORICAL ENCYCLOPEDIA*, p231 ABC-CLIO (December 11, 2003) (describing the AAA as a "[g]overnment limitation on agricultural production to raise price per unit and a primary policy tool designed to stabilize agricultural commodity prices and thus farm income and closures.").

²² See Carolyn Dimitri, Anne Effland, and Neilson Conklin, *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, USDA ERS, Electronic Information Bulletin Number 3, June 2005, available at <http://www.ers.usda.gov/publications/EIB3/eib3.pdf>.

²³ R. B. Heflebower, *Price Stabilization under the Farm Board*, *Journal of Farm Economics*, Vol. 12, No. 4, pp. 595-610 (Oct., 1930).

²⁴ CCC Charter Act of 1948 (P.L. 80-806); see Committee Reports 111th Congress (2009-2010), Senate Report 111-221 – Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Bill, 2011.

²⁵ History of Agricultural Price-Support and Adjustment Programs, 1933-84 Background for 1985 Farm Legislation, USDA Economic Research Service, Agriculture Information Bulletin Number 485, available at <http://www.ers.usda.gov/Publications/aib485/aib485fm.pdf>.

surpluses and were paid for by taxing companies that processed agricultural goods. The 1933 Act also created a system of land allotments, which in conjunction with the 1935 Soil Conservation and Domestic Allotment Act, worked to prevent over-farming and to avoid crop surpluses. The Supreme Court in 1936, however, intervened and held that the taxation and redistribution scheme in the Agricultural Adjustment Act was an unconstitutional reallocation of property. The Court further ruled that the regulation of agriculture in this manner was a usurpation of state powers that violated of the Commerce Clause.²⁶

Agricultural problems persisted, and public support mounted for some type of agricultural support system. Spurred by Roosevelt's 1937 court-packing plan, the Supreme Court began backing away from its opposition to New Deal legislation. In 1938, Congress successfully passed the Agricultural Adjustment Act of 1938, which instituted the farm subsidy policies first introduced in the 1933 legislation and opened the way for subsequent farm bills.²⁷ The 1933 legislation provided mandatory price supports for corn, cotton, and wheat that would guarantee a baseline level of production and keep supply levels in alignment with market demand.²⁸ The government accomplished this by making sure the price of a commodity never deviated too far from its parity price relative to farmers' expenses.²⁹ In order to keep the price and supply levels at desired level, the AAA was authorized under the Act to extend loans to farmers to grow additional staple commodities, such as corn, during good years, which were stored by the government and could then be

²⁶ *United States v. Butler*, 297 U.S. 1 (1936).

²⁷ Agricultural Adjustment Act of 1938 (P.L. 75-430)

²⁸ History of Agricultural Price-Support and Adjustment Programs, 1933-84, *supra* note 25 at iv.

²⁹ The Agricultural Adjustment Act of 1938 states that the parity price is calculated from the average prices received by farmers for agricultural commodities during the last 10 years.

released when yields were low.³⁰ The act also continued to rely on soil conservation techniques.³¹ The 1938 Agricultural Adjustment Act remains the permanent background law of commodity programs and farm income supports, and it reverts into effect if at any time a superseding bill is not in effect.³² Although since superseded by subsequent legislation, the 1938 Act continues to cast its shadow over the administration of subsidies to the present.

C. The Rise of the Multi-year Omnibus Farm Bill

The Agricultural Act of 1949,³³ in amended form, is known as the permanent legislation, and like the 1938 Act and the 1948 Commodity Credit Corporation Charter Act, remains part of the background agricultural law to the present day.³⁴ The 1949 Act provided legal authorization to the CCC to reallocate surplus foods, including corn and other staples, to school lunch programs, poor Americans, and internationally to friendly nations as development aid.³⁵ The CCC was given corporate charter in 1948 and was authorized under the 1949 Act to administer the USDA's farm price and income support commodity programs and agricultural subsidies.

Beginning in 1965, Congressional agricultural legislation took the form of multi-year (usually five-year) omnibus farm bills that touched on nearly every aspect of food and

³⁰ G. V. L. Perkins, *CRISIS IN AGRICULTURE* (1969). *See also* Agricultural Adjustment Administration, available at <http://www.infoplease.com/ce6/history/A0802770.html>.

³¹ *Id.*

³² *See* History of Agricultural Price-Support and Adjustment Programs, 1933-84, *supra* note 25 at iv; AAA, Agricultural Adjustment Act, Farming in the 1930s, Wessels Living History Farm, available at http://www.livinghistoryfarm.org/farminginthe30s/water_11.html.

³³ History of Agricultural Price-Support and Adjustment Programs, 1933-84, *supra* note 25 at iv. *See also* Agricultural Acts of 1948 (Pub.L. 80-897) and 1949 (Pub.L. 89-349).

³⁴ *See* C. Edwin Young and Paul C. Westcott, The 1996 U.S. Farm Act Increases Market Orientation/AIB-72, Economic Research Service, USDA, at FN1 (1996).

³⁵ *See* AGRICULTURAL ACT OF 1949 [As Amended Through P.L. 110-246, Effective May 22, 2008].

agricultural policy in the country.³⁶ A report by the Congressional Research Service gives the following explanation for its development:

“Although many [food and agricultural] policies can be and sometimes are modified through freestanding authorizing legislation or as part of other laws, the omnibus, multi-year farm bill provides a predictable opportunity for policymakers to address agricultural and food issues more comprehensively. . . . The omnibus nature of the bill can create broad coalitions of support among sometimes conflicting interests for policies that individually might not survive the legislative process.”³⁷

The Food and Agriculture Act of 1965 was the first such multi-year farm legislation and contained a combination of federal commodity and farm-support policies. The Act established mandatory acreage allotments, planting restrictions, marketing quotas, and payment and diversion programs for a number of agricultural products. These provisions were effective for only a limited number of years or until another comprehensive farm bill renewed them. As the first omnibus multi-year farm bill, the Act continues to serve as Congress’ template for farm policy. According to a Congressional Research Service Report, the a farm bill “include[s] titles on commodity programs, trade, rural development, farm credit, conservation, agricultural research, food and nutrition programs, marketing, etc.”³⁸

The Agricultural Act 1970 was the next of many multi-year farm bills. The 1970 Act relied on parity pricing, along with a farmland set-aside program and market certificates

³⁶ “The U.S. farm bill is the primary agricultural and food policy tool of the federal government. The multi-year, comprehensive omnibus bill contains federal commodity and farm support policies, as well as other farm-related provisions. It usually amends some and suspends provisions of permanent law, reauthorizes, amends, or repeals provisions of preceding temporary agricultural acts, and puts forth new policy provisions for a limited time into the future. Nine bills between 1965 and 2002 are generally agreed to be farm bills; the 2008 farm bill, the Food, Conservation, and Energy Act of 2008, is the tenth.” Farm Bill, Committee on Agriculture, U.S. House of Representatives, <http://agriculture.house.gov/singlepages.aspx?NewsID=1227&LSBID=1271> (last visited April 5, 2011).

³⁷ Renée Johnson and Jim Monke, What is the Farm Bill?, Congressional Research Service Report for Congress (Dec. 10, 2010), available at <http://www.nationalaglawcenter.org/assets/crs/RS22131.pdf>.

³⁸ Jasper Womach, CRS Report for Congress: Agriculture: A Glossary of Terms, Programs, and Laws, (2005). Available at: <http://ncseonline.org/nle/crsreports/05jun/97-905.pdf&pli=1>.

that were redeemable for pre-specified amounts of CCC-owned commodities.³⁹ The Act additionally made several more restrictive aspects of the 1965, such as acreage allotments and marketing quotas, open to voluntary participation by farmers and for the first time imposed caps on payments to any single agricultural producer.⁴⁰

This bill was followed in the 1973 Agriculture and Consumer Protection Act, an transformative bill that authorized subsidies, created several rural development and conservation programs, authorized disaster response, amended the food stamp program, and, most notably, initiated the system of target prices and deficiency payments.⁴¹ This four-year bill represents perhaps the most major shift in American farm policy since the Great Depression.⁴² Agricultural business had been lobbying for deregulation for decades, and under Nixon's Secretary of Agriculture, Earl Butz, took up this cause within the administration, even arguing that overproduction and a resultant drop in the price of commodity grains would increase exports and facilitate the production of ethanol and synthetic sweeteners.⁴³ In the wake of the failed Russian Wheat Deal and the World Food Crisis of the early 1970s, Secretary Butz argued that advocated the elimination of support systems and took the position that the problems associated with food surpluses could best

³⁹ James A. Langley, Robert D. Reinsel, John A. Craven, James A. Zellner, and Frederick J. Nelson, Commodity Price and Income Support Policies in Perspective, Agricultural Food Policy Review: Commodity Program Perspectives, Agricultural Economic Report No. (AER530) 260 pp, (July 1985).

⁴⁰ Annual payments were limited to \$55,000 per producer per crop. The Agricultural Act of 1970 (P.L. 91-524); *see also* Geoffrey S. Becker, ed., Farm Commodity Legislation: Chronology, 1933-98 (Feb. 9, 1999).

⁴¹ The Agriculture and Consumer Protection Act of 1973 (P.L. 93-86).

⁴² Charlene C. Kwan, Fixing the Farm Bill: Using the "Permanent Provisions" in Agricultural Law to Achieve WTO Compliance, 36 B.C. Envtl. Aff. L. Rev. 571, (2009) ("In a complete reversal of policy, post-1973 farm policies sought to 'giv[e] farmers incentive to produce as much as possible.'")(citing Tom Philpott, Food First: Institute for Food and Development Policy, The 2007 Farm—and Food—Bill, Backgrounder, Fall 2006, at 1, 3, available at <http://www.foodfirst.org/files/pdf/backgrounders/fall2006.pdf>).

⁴³ The National Family Farm Coalition (NFFC), King Corn Fact Sheet, available at <http://www.nffc.net/Learn/Fact%20Sheets/King%20Corn%20Fact%20Sheet.pdf>.

be reduced through free trade.⁴⁴ With rejoinders to farmers to “get big or get out” and to grow corn “fencerow to fencerow,” Butz helped usher in a new era of agricultural production. Butz dismantled supply management policies and sold off government storage bins and food reserves, and, rather than subjecting the agricultural sector to market forces as his public comments proposed, Butz oversaw the implementation of a new set of industry-favorable market regulations, the system of target prices and deficiency payments, where commodity producers received payments anytime the market price fell below the Congressionally specified target price.⁴⁵ Deficiency payments, described in greater detail in Section II. A., continue to characterize the administration of subsidies for corn and other covered commodities to the present day and remained a central component of subsequent farming legislation.⁴⁶

The next such omnibus farm bill, the Food and Agriculture Act of 1977, increased price and income supports for farmers, set acreage allotments, and created the two-tier pricing support system, which paid farmers different prices for amounts grown in excess of quota amounts.⁴⁷ The allotment and two-tiered support system were intended to keep the market supply in commodities stable by simultaneously encouraging farmers to comply and to use allotted acreage for the crops specified by the government. The bill was followed in 1981 by the Agriculture and Food Act, which set four-year target prices for a number of commodities and established marketing quotas.”⁴⁸ The quota, allotment, and price-setting provisions of these bills support the proposition that Congress was using subsidies to

⁴⁴ Id.

⁴⁵ See Farm Boom of the 1970s, Farming: 1970s to Today, Wessels Living History Farm, available at http://www.livinghistoryfarm.org/farminginthe70s/money_02.html.

⁴⁶ 2008 Farm Bill Side-by-Side: Title I: Commodity Programs, USDA ERS, available online at <http://www.ers.usda.gov/FarmBill/2008/Titles/TitleIcommodities.htm#direct>.

⁴⁷ Jasper Womach, CRS Report for Congress, *supra* note 38.

⁴⁸ Id.; The Agriculture and Food Act of 1981 (P.L. 97-98).

control price fluctuations and ensure a stable food supply. The caps that were first introduced in the 1970 Act indicate that larger industrial farmers were benefiting from the subsidy programs and that subsidies programs had expanded beyond the welfare rationale that motivated the depression-era legislation.

The next of these five-year omnibus farm bills, the Food Security Act, was passed in 1985 and served to reduce commodity prices and income supports for farmers.⁴⁹ Amendments to the 1985 act⁵⁰ changed subsidy acreage base calculations and gave USDA discretion to require cross-compliance for feed grains rather than mandating them.⁵¹ Subsequent amendments in the 1986 and 1987 budget reconciliation bills⁵² required advance deficiency payments to be made to producers at a minimum of 40% for wheat and feed⁵³ and set annual deficiency payment limitations at \$50,000 per person per crop.⁵⁴ The Food, Agriculture, Conservation, and Trade (FACT) Act of 1990 largely kept in place the existing subsidy delivery systems but introduced several modest reform provisions that were intended to increase market-orientation and reduce subsidy-dependence. The bill did so by electing not to raise target prices from the 1985 levels and by giving farmers greater flexibility about what they would grow. The 1993 Omnibus Budget Reallocation Act (OBRA) continued this topical approach to improving market orientation by eliminating USDA's role in determining whether land must be set aside for conservation or for commodity

⁴⁹ The Food Security Act of 1985 (P.L. 99-198).

⁵⁰ Technical Corrections to Food Security Act of 1985 Amendments (P.L. 99-253); Food Security Improvements Act of 1986 (P.L. 99-260).

⁵¹ Id.

⁵² Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509); Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203).

⁵³ Jasper Womach, Carol Canada, *Agriculture: a glossary of terms, programs, laws and websites*. p.90, Nova Science Publishers, Inc. (2000).

⁵⁴ Id.; See also Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509); 1987 Appropriations Bill, (P.L. 99-591).

crops such as corn, by reducing payments based on acreage, and by extending the expiration of the deficit reducing aspects of OBRA and FACT through 1998.⁵⁵

In 1996, Congress passed the omnibus Federal Agriculture Improvement and Reform Act (FAIR), known also as the Freedom to Farm Act.⁵⁶ The bill was touted as a move to simplify direct payment systems and to alter the deliver of subsidies by delinking support payments from the market price of commodities, replacing those payments with a fixed income payment tied to acreage.⁵⁷ The bill additionally modified stockholding, export subsidies, and food aid programs. According to the United Nations Food and Agriculture Organization, “On the whole, the FAIR Act reinforces market-oriented policies, which had been initiated in 1985 and seeks to reduce government intervention.”⁵⁸

However, the attempt to overhaul the deficiency payment system proved rather lackluster. Although the 1996 FAIR technically eliminated deficiency payments and replaced them with production flexibility contract payments, the Farm Security and Rural Investment Act of 2002 reinstituted deficiency payments as counter-cyclical payments with somewhat different payment calculations.⁵⁹ The move to end deficiency payments was in fact even more half-hearted and short-lived than the preceding sentences suggest. Even during the short period between 1996 and 2002, the system that replaced the target-based deficiency model actually awarded subsidies on a per acre basis dependent on previous deficiency payment receipts—in effect pegging payments to the standard Congress was

⁵⁵ available at <http://www.gpo.gov/fdsys/pkg/BILLS-103hr2264eh/pdf/BILLS-103hr2264eh.pdf>

⁵⁶ Federal Agriculture Improvement and Reform Act of 1996 (P.L. 104-127), available at <http://www.csrees.usda.gov/about/offices/legis/96frmbil.html>.

⁵⁷ *Id.* See also The review of the 1996 farm legislation in the United States, Food and Agriculture Organization of the United Nations, Economic and Social Development Department, available at <http://www.fao.org/docrep/w8488e/w8488e04.htm>.

⁵⁸ *Id.*

⁵⁹ Jasper Womach, CRS Report for Congress, *supra* note 38.

purportedly moving away from.⁶⁰ Farms receiving large payments under the deficiency payment system continued to receive per-acreage 'transition' Production Flexibility Contracts (PFCs) which were decoupled from market supply determinations but which remained linked to amounts received under the deficiency payment system.⁶¹ As researchers at the libertarian Cato Institute noted, "although the new PFC subsidy payments are formally independent of production, they still encourage oversupply."⁶² This transition hardly had time to begin before Congress intervened again. As market prices began falling in 1998, Congress responded with a number of emergency spending bills providing money to farmers, despite indications two years earlier that it would end such payments.⁶³ This short-lived attempt at scaling back agricultural subsidies, predictably, did little to alter the incentives created under the prior deficiency and target payment systems. In reality, as the Office of Budget Management (OMB) predicted and the USDA ERS has since documented, agricultural subsidies payments continued to rise over that period.⁶⁴

The failed 1996 attempt at transitioning away from deficiency payments seemed to discourage Congress from following through with its deregulatory push. In 2002, the newest omnibus farm bill, the Farm Security and Rural Investment Act of 2002, reintroduced a system of deficiency payments similar to those eliminated in 1996, this time under the name counter-cyclical payments (CCPs) which pay farmers the difference

⁶⁰ See Michael Bell, ed., *FARMING FOR US ALL: PRACTICAL AGRICULTURE & THE CULTIVATION OF SUSTAINABILITY*, Pennsylvania State Univ. Press, at Note 3, p.255 (June 22, 2004); Mary Burfisher and Jeffrey Hopkins, *Farm Payments:Decoupled Payments Increase Households' Well-Being, Not Production*, USDA ERS Amber Waves: The Economics of Food, Farming, Natural Resources, and Rural America, Feb. 2003, available at <http://www.ers.usda.gov/AmberWaves/Feb03/Features/FarmPayments.htm>.

⁶¹ Chris Edwards and Tad DeHaven, *Farm Subsidies at Record Levels As Congress Considers New Farm Bill*, Cato Institute, at 4 (Oct. 18, 2001), available at <http://www.cato.org/pubs/briefs/bp70.pdf>.

⁶² *Id.* at 5.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 2-3.

whenever the market price for a commodity falls below a Congressionally specified target price.⁶⁵ The 2002 bill faced significant opposition from both Democrats and Republicans in the Senate, and the final version of the bill did succeed in implementing lower caps on the total combined subsidies paid to individual farmers at \$275,000, half the previous limit.⁶⁶

The most recent Farm Bill was the Food, Conservation, and Energy Act of 2008.⁶⁷ The final bill kept in effect most of the subsidy programs in the 2002 bill,⁶⁸ notwithstanding the record profits that farmers had been earning.⁶⁹ The Act adjusted eligibility requirements and crop insurance programs,⁷⁰ and retained provisions continued to provide direct payments and counter-cyclical payments at precisely the same rates as the 2002 Farm Bill did between 2004 and 2007.⁷¹ Its passage was somewhat controversial and reveals the shifting political considerations now bearing on the continuation of U.S. commodity subsidies. The United Nations and the World Trade Organization, joined by the EU, Brazil, Argentina, Canada, and others, released a report criticizing U.S. agricultural subsidies and asking they be discontinued because of their distortive effects on international markets.⁷² George W. Bush attempted to veto the bill, citing these concerns

⁶⁵ Gerald E. Plato, David W. Skully, and D. Demcey Johnson, Valuing Counter-Cyclical Payments: Implications for Producer Risk Management and Program Administration, USDA Economic Research Service (ERS), ERR-39, available at <http://www.ers.usda.gov/publications/err39/err39a.pdf>.

⁶⁶ Elizabeth Becker, Senate Passes \$44.9 Billion Farm Bill Limiting Subsidies, New York Times, Feb. 14, 2002, available at <http://www.nytimes.com/2002/02/14/us/senate-passes-44.9-billion-farm-bill-limiting-subsidies.html>.

⁶⁷ The Food, Conservation, and Energy Act of 2008 (Pub.L. 110-234, 122 Stat. 923, enacted May 22, 2008).

⁶⁸ 2008 Farm Bill Side-by-Side: Title I: Commodity Programs, *supra* note 46.

⁶⁹ David M. Herszenhorn, Tentative Deal Reached in Congress on Farm Bill, The New York Times, April 26, 2008, available at <http://www.nytimes.com/2008/04/26/washington/26farm.html>.

⁷⁰ 2008 Farm Bill Side-by-Side: Title I: Commodity Programs, *supra* note 46.

⁷¹ *Id.*

⁷² EU joins WTO complaint against U.S. corn subsidies, International Herald Tribune, Jan. 29, 2007, available at <http://www.nytimes.com/2007/01/22/business/worldbusiness/22iht-wto.4296092.html>.

and noting that it deviated from free-market principles, but he proved unable to move the Senate off of its support for the existing subsidy programs.⁷³

II. The Incentive Architecture of the Corn Subsidy

Agricultural subsidies were a sensible policy response to the deflation that threatened American grain prices in the early 1930s and to address the food shortages of the early 1970s. The legislative response to these two crises was not to provide short-term cash injections, but to completely alter the market pressures confronting corn farmers and other grain producers. The subsidies in the Farm Bill, however, are not tailored properly to address only these issues and are insufficiently connected to yields and prices. And because of agriculture's relationship to other sectors of the economy, the bill impacts far more than the stability of agricultural prices.

Corn growers received over \$56 billion in federal subsidies between 1995 and 2006, and it is expected that subsidies to corn growers may soon exceed \$10 billion per year.⁷⁴ This direct outlay from the U.S. tax base is only the beginning. To understand the full array of costs associated with this legislation, corn subsidies cannot be viewed simply as recurring payments from the federal treasury to farmers. Farm bill subsidies represent a much more comprehensive reconfiguration of incentives: they are a game-changing event that produces systemic consequences far beyond the markets in corn and commodity

⁷³ Alan Bjerga, Senate Approves Farm Bill Over Bush Veto Threat, Bloomberg Dec. 14, 2007, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWlfSjtImPgE>. In response to Bush's veto threat and notwithstanding pressure from the international community, the Senate voted 79-14 to retain the subsidy provisions at issue.

⁷⁴ Brandon Keim, Fast Food: Just Another Name for Corn, Wired Magazine, Nov. 10, 2008, at <http://www.wired.com/wiredscience/2008/11/fast-food-anoth/>.

foods. The farm bill “sets the rules for the American food system—indeed to a considerable extent for the world’s food system.”⁷⁵

This Section seeks to examine the mechanisms through which the corn subsidy provisions of the farm bill impact institutions and market structures beyond the market in commodity corn. Part A provides an account of the deficiency payments, direct payments, and non-recourse loans that deliver agricultural subsidies. Part B describes the affect of these subsidies on the relative cost of other foods and explores the impact of subsidies on meat production and other secondary corn products, such as those containing corn-derived high-fructose corn syrup (HFCS). Part C examines the healthcare expenses and increased costs, particularly those related to the rising incidence of obesity and diabetes, that are attributable to overconsumption of corn-based food products and corn-fed animal products. Part D looks at the environmental costs associated with excessive corn production, and Part E considers the effect of U.S. corn subsidies on global food prices and on international labor markets.

A. Deficiency Payments, Guarantees, and a Glut of Corn

As the U.S. House Committee on Agriculture describes it, “The U.S. farm bill is the primary agricultural and food policy tool of the federal government.”⁷⁶ Corn subsidies affect the price of nearly everything in the American food supply. This Part begins with a description of the current administration of corn subsidies and how those affect prices, with specific emphasis given to the use of deficiency payments in recent Farm Bill legislation. Beyond subsidies’ immediate effects on the price of corn and other commodity

⁷⁵ Michael Pollan, “You Are What You Grow,” in *Manifestos on the Future of Food & Seed*, ed. Vandana Shiva, South End Press, Cambridge, MA (2007).

⁷⁶ Farm Bill, Committee on Agriculture, U.S. House of Representatives, available at <http://agriculture.house.gov/singlepages.aspx?NewsID=1227&LSBID=1271> (last visited 4/3/2011).

grains, I have attempted to distinguish two separate but related processes through which subsidies lead to market distortions throughout our food system. First, corn subsidies directly reduce the manufacturing costs of all corn-containing products (an almost endless list including refined sugars, corn syrup, corn starch, coloring, etc.) and the costs of corn-fed animal products. This in turn reduces consumer prices for these same products. Secondly, the relative price of nonsubsidized (and often healthier) alternatives to these products is made artificially high. The reduced market share translates into fewer market participants, further exacerbating the less-than-optimal levels of competition that could be making healthier or higher-welfare alternative foods more available.

It is worth exploring more in depth how the payment system contemplated in the Farm Bill legislation operates. There are three systems for agricultural support: deficiency or counter-cyclical payments, direct payments, and non-recourse marketing loans. These three support systems, and their interaction, produce a drastic change from the incentives associated with traditional understandings of supply and demand. The following summary of the first of these, deficiency payments, excerpted from Jasper Womach's CRS Report for Congress is a useful starting point:

"The crop-specific deficiency payment rate was based on the difference between the legislatively set target price and the lower national average market price during a specified time. The total payment was equal to the payment rate, multiplied by a farm's eligible payment acreage and the program payment yield established for the particular farm. In the latter years of the program, farmers could receive up to one-half of their projected deficiency payments at program signup. If actual deficiency payments, which were determined after the crop year, were less than advance deficiency payments, the farmer was required to reimburse the government for the difference."⁷⁷

⁷⁷ Jasper Womach, CRS Report for Congress, *supra* note 38 at 73.

Congress additionally pays farmers a guaranteed price on top of the price floor created by deficiency payments. Although Congress nominally eliminated deficiency payment program with the 1996 legislation,⁷⁸ the counter-cyclical payments (CCPs) reintroduced in 2002 operate in essentially the same way, by paying farmers the difference when the market price for a commodity fall below the target price.⁷⁹

Secondly, and without regard to annual fluctuations in price or yield, direct payments of a fixed amount are available to commodity producers on a per bushel basis. Direct payments are available even if the market price is above the CCP target. If the market price is below the CCP target, the farmer will receive the difference between the market price and the target, in addition to the legislatively determined direct payment amount.⁸⁰ Under the 2002 Farm Bill, for example, farmers were guaranteed \$2.60 from 2002–03 and \$2.63 from 2004–2007 per bushel, on top of which they would receive an additional direct payments of 28 cents per bushel.⁸¹ If the market price in fact rose above the Congressionally created floor, Congress would continue to pay direct subsidies at the rate of 28 cents per bushel.⁸² The 2008 bill keeps the \$2.63 target and the 28 cent direct payment through the end of Calendar Year 2012.⁸³

According to accepted economic models of supply and demand, one would predict an increase in the supply of corn to drive prices down. Production, one would expect, should only continue up to the point that the market price is larger than the cost of production. That is, farmers will stop growing corn if they're losing money on it. The

⁷⁸ Federal Agriculture Improvement and Reform Act of 1996 (P.L. 104-127).

⁷⁹ See, e.g., Jasper Womach, CRS Report for Congress, *supra* note 38 at 73.

⁸⁰ 2008 Farm Bill Side-by-Side: Title I: Commodity Programs, *supra* note 46.

⁸¹ *Id.* See also "The 2002 Farm Bill: Title 1 Commodity Programs". USDA. 2002-05-22, available at <http://www.ers.usda.gov/Features/farmbill/titles/title1commodities.htm>.

⁸² 2008 Farm Bill Side-by-Side: Title I: Commodity Programs, *supra* note 46.

⁸³ *Id.*

problem is that the deficiency-payments-plus-guarantee system of the recent Farm Bill makes sure that can never happen. The price supports described here have eliminated these market forces completely. By providing payments above the market value, no matter what price the market reaches, the government over-stimulates production, which further suppresses the market price while doing nothing to reduce the availability of government price supports. The result is a feedback loop without any signs of slowing down. Congress pays corn growers no matter how many bushels they churn out, and the incentive is to always grow more, irrespective of market forces. As Larry Lessig observed in his TED lecture, *Citizens: The Need and the Requirements*, “Some economists estimate that the cost of growing corn is actually negative. You get paid to grow corn.”⁸⁴ This is not a functioning market. The principles of supply and demand do not operate here. By offering to extend payments whether prices rise or fall, Congress has literally handed a blank check to corn growers.

The third major component of the federal agricultural support system is the marketing loan program. “New Deal. This program was designed to provide short-term financing to pay farm expenses before crops were sold, but it has morphed into simply another multi-billion-dollar subsidy program.”⁸⁵ Under the original system, the government extended loans to farmers to allow them to pay operational expenses before

⁸⁴ Laurence Lessig, *Citizens: The Need and the Requirements—Our Nation Desperately Needs Citizens*, TED San Antonio, Oct. 16, 2010, video available at <http://www.youtube.com/watch?v=Xz3RdkO824A>. See also Alicia Harvie and Timothy A. Wise, *Sweetening the Pot*, Global Development and Environment Institute/Tufts University, available at <http://www.ase.tufts.edu/gdae/Pubs/rp/PB09-01SweeteningPotFeb09.pdf> (“GDAE estimated that corn and soybeans were priced 23% and 15% below their average production costs, respectively, in the nine-year period following the 1996 Farm Bill, 1997-2005.”).

⁸⁵ Chris Edwards and Tad DeHaven, *Farm Subsidies at Record Levels*, *supra* note 61 at 6 (citing Commission on 21st Century Production Agriculture, *Directions for Future Farm Policy: The Role of Government in Support of Production Agriculture* (Washington: U.S. Department of Agriculture, January 2001), chap. 1, Minority View, pp. 14–15, <http://www.usda.gov/oce/21st-century/report.pdf>).

harvest, and after the crops were sold, farmers would then repay the government. But because the loans were non-recourse, farmers faced no penalty for not repaying when crop prices were low except that they would forfeit their crops to the government.⁸⁶ This, in effect, serves as an additional subsidy to corn growers, because whenever the market price falls below the loan amount, the rational economic strategy growers follow is to accept the government's marketing loan. On top of this de facto subsidy, taxpayers also bear the expense of maintaining the government's commodity stockpiles.⁸⁷ The marketing loan program also makes a second option, loan deficiency payments (LDPs), available to farmers, which enables farmers to receive the subsidy without actually structuring the payment as a secured nonrecourse loan.⁸⁸

Together the total cost these programs between 1995 and 2009 exceeded \$73.8 billion.⁸⁹ That averages to approximately \$4.92 billion in annual transfers to corn producers.⁹⁰

B. Distorting Price Signals Throughout the Food Supply

This broken incentive system invites farmers to produce endlessly. This results in a glut of corn that needs someplace to go. As corn flooded the marketplace, its purchase price fell further and further relative to other foodstuffs.⁹¹ Corn, in the form of high-fructose corn syrup, quickly became a cheaper source of sugar than sugar cane. Similarly,

⁸⁶ Id. (citing U.S. Department of Agriculture, Economic Research Service, "Farm and Commodity Policy: Basic Mechanisms of Programs," Briefing Room, www.ers.usda.gov/briefing/FarmPolicy/malp.htm).

⁸⁷ Id.

⁸⁸ Id. (citing Paul C. Westcott and C. Edwin Young, "U.S. Farm Program Benefits: Links to Planting Decisions and Agricultural Markets," U.S. Department of Agriculture Agricultural Outlook, October 2000, p. 13)

⁸⁹ Corn Subsidies in the United States totaled \$73.8 billion from 1995-2009. Farm Subsidy Database, Environmental Working Group.

⁹⁰ Id.

⁹¹ See, e.g. Tom Laskawy, Tax Junk Food, but also subsidize veggies, May 20, 2009, available at <http://www.grist.org/article/tax-the-bad-and-subsidize-the-good>.

corn became a cheap feed grain for industrial animal producers, and corn even became an input for ethanol energy producers, despite the fact that it is at least six times less efficient than other sugar sources.⁹² This tendency of surplus commodities to find their way into other parts of the market or into the supply chain is an expected, predictable economic outcome, as is an increase in consumption. “Since the Nixon administration, farmers in the US have managed to produce 500 additional calories per person every day (up from 3,300, already substantially more than we need); each of us is, heroically, managing to put away 200 of those surplus calories at the end of their trip up the food chain.”⁹³ Compare what happened in the lead up to the recent financial crisis, when the over-availability of cheap credit resulted in the creation of harmful financial products such as subprime mortgages and teaser rate credit cards that led to overextended consumer spending. Corn was cheap and plentiful. Although the overall amount that people can eat is somewhat inelastic, the market in specific foods is less so, particularly when the food product in question can be used as an input and put to other ends.⁹⁴ All of that excess corn needed some place to go.

Consider the following passage from an essay by John Mackey, the founder and CEO of Whole Foods, on the impact of corn subsidies on meat production:

“Each year the federal government doles out billions of dollars to the U.S. factory farming industries, especially to keep artificially low the prices of corn and soybeans, largely used as farmed animal feed. These large corporations receive taxpayer money, and while this does filter down to a certain extent to cheaper animal-based foods, it also distorts markets tremendously. These subsidies allow animal products to be sold far below their true costs.

⁹² J.K. Bourne, *Biofuels: Green Dreams*, National Geographic Magazine, Oct. 2007 p. 41, available at <http://ngm.nationalgeographic.com/2007/10/biofuels/biofuels-text>.

⁹³ Michael Pollan, *THE OMNIVORES DILEMMA*, Penguin Press; First edition at 103 (April 11, 2006).

⁹⁴ Assessing Changing Food Consumption Patterns, National Research Council (U.S.). Committee on Food Consumption Patterns, Assembly of Life Sciences (U.S.), Appendix A at 58-59, Washington D.C. (2001).

Take corn subsidies, for example. Simply put, government subsidizing of corn subsidizes the factory farm animal production system, which is largely dependent on corn for feed. Eliminating corn subsidies is a first step to valuing animals more accurately. If those subsidies were taken away, animal products in general would become more expensive, and it is likely that less meat, eggs, and milk would be bought as a result—a positive outcome for our health, economy, environment, and the animals themselves. In addition, if corn were not subsidized by the government, higher welfare products like grass-fed beef would become more economically competitive in the market with beef from cattle confined on feedlots—another way of giving customers a fair alternative.”⁹⁵

Meat and dairy production is a major, albeit indirect, recipient of the subsidies for feed crops such as corn. According to data from the USDA, in 2009 over 40% of corn grown in the United States was used as feed for animals.⁹⁶

A report by the Institute for Agriculture and Trade Policy estimates that below-cost feed crops reducing operating costs for poultry and hog producers, concluding that “these corporations’ overall costs could be as much as 7-10% higher if they compensated farmers fairly for the feed components they produce.”⁹⁷ Citing a recent Tufts University study, Tom Philpott estimated that between 1997 and 2005 the combined subsidies passed on to chicken, pork, beef and HFCS producers exceeded \$26.5 billion.⁹⁸ The lower prices for producers has increased profit margins, but these reduced costs have also been passed on to consumers and further increased the availability of meat and dairy products.

⁹⁵ John Mackey. *Taxpayers*. Chapter in GRISTLE: FROM FACTORY FARMS TO FOOD SAFETY (THINKING TWICE ABOUT THE MEAT WE EAT), edited by Moby with Miyun Park, The New Press: New York (2010).

⁹⁶ Tom Philpott, Why are we propping up corn production again?, *Grist*, March 25, 2010. Available at <http://www.grist.org/article/2010-03-25-corn-ethanol-meat-hfcs> (Citing USDA, ERS, Feed Outlook: U.S. Corn Usage by Segment 1/10).

⁹⁷ Dennis Olson, Below Cost Feed Crops, An Indirect Subsidy for Industrial Animal Factories, Institute for Agriculture and Trade Policy

⁹⁸ Tom Philpott, Why are we propping up corn production again?, *supra* note 96 (citing Alicia Harvie and Timothy A. Wise, Sweetening the Pot: Implicit Subsidies to Corn Sweeteners and the U.S. Obesity Epidemic, *supra* note 84).

As Heather Schoonover and Mark Muller have noted, “The ability of fast-food restaurants to put hamburgers on the 99¢ value menu can also be linked to cheap commodities.”⁹⁹ A 2008 study by A. Hope Jahren and Rebecca A. Kraft used carbon and nitrogen stable isotopes to infer the source of feed to meat animals, and the influence of increased corn production is undeniable.¹⁰⁰ A writer for Wired Science summarized Jahren and Kraft’s findings thusly: “Chemical analysis from restaurants across the United States shows that nearly every cow or chicken used in fast food is raised on a diet of corn.”¹⁰¹ Together, meat and dairy products make up the largest sources of cholesterol and saturated fat in the American diet.¹⁰²

Another important and much-researched topic is the effect of corn subsidies on the cost of products that are high in sugar, most notably in the form of HFCS. As a result of subsidies, sugar tariffs, and increased production, the price of corn fell relative to the price of sugar. Once a Japanese researcher, Dr. Y. Takasaki, developed an affordable industrial production method for converting corn starch into HFCS, it became far more cost-effective for a broad range of food manufacturers and producers to rely on synthesized corn sugars such as HFCS rather than cane sugar as a primary sweetener.¹⁰³ This was particularly true given the low price of corn that resulted from over-stimulated production attributable to

⁹⁹ Heather Schoonover & Mark Muller, Inst. for Agric. & Trade Pol’y, Food Without Thought: How U.S. Farm Policy Contributes to Obesity 6 (2006), available at <http://www.healthobservatory.org/library.cfm?RefID=80627>.

¹⁰⁰ A. Hope Jahren and Rebecca A. Kraft, Carbon and nitrogen stable isotopes in fast food: Signatures of corn and confinement, The National Academy of Sciences (2008), available at <http://www.pnas.org/content/105/46/17855>

¹⁰¹ Brandon Keim, Fast Food: Just Another Name for Corn, *supra* note 74.

¹⁰² See Jane Black, The War on Pizza, Feb. 4, 2011, available at <http://nymag.com/news/intelligencer/71280>.

¹⁰³ See, e.g. Enas Imail, High Fructose Corn Syrup, Quintessential Magazine, Nov. 1, 2009, available at <http://qwmagazine.co.uk/science/high-fructose-corn-syrup>.

the agricultural subsidies in place during the 1970s.¹⁰⁴ As was true for meat production, these lower manufacturing costs translated into increased production and lower prices for end consumers for a broad range of HFCS-containing foods. Benforado, Hanson, and Yosifon made the following observation:

“While it would be intuitive to imagine this as a good thing for the health of Americans—a way to increase the consumption of vegetables—it turns out that most of the subsidy does not go toward producing fresh ears of corn for the local farmers market, but rather into producing inexpensive, high-calorie, highly-processed foods like soda, candy, and hotdogs.”¹⁰⁵

It is incredibly doubtful that then Secretary of Agriculture Butz or anyone in Congress anticipated this precise outcome, but once industry gradually began to identify a strong dependence on the corn subsidy, the position that the subsidy was operating in the public interest became less plausible. Archer Daniels Midland (“ADM”), for example, is one of the nation’s leading manufacturers of high-fructose corn syrup and other corn-based sweeteners, and in 1995, at least 43% of its profits came from government subsidized activities.¹⁰⁶ HFCS is now found in over 40% of all products in the supermarket.¹⁰⁷ A recent study in the American Journal of Clinical Nutrition found that, “[b]y 2004, HFCS provided roughly 8% of total energy intake compared with total added sugar...accounting for 17% of

¹⁰⁴ Id. See also The National Family Farm Coalition (NFFC), King Corn Fact Sheet, *supra* note 43 at 2.

¹⁰⁵ Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales, Obesity and Justice in America*, 53 Emory L.J. 1645, 1792-93 (2004) (examining the government's failure to recognize the connection among corn subsidies, high fructose corn syrup, and obesity) (citing Michael Pollan, *THE OMNIVORES DILEMMA*, *supra* note 93 at 46; James Bovard, Archer Daniels Midland: A Case Study in Corporate Welfare, at <http://www.cato.org/pubs/pas/pa-241.html> (Sept. 26, 1995)).

¹⁰⁶ James Bovard, Archer Daniels Midland: A Case Study in Corporate Welfare, (Sept. 26, 1995), at <http://www.cato.org/pubs/pas/pa-241.html>.

¹⁰⁷ Laurence Lessig, *Citizens: The Need and the Requirements—Our Nation Desperately Needs Citizens*, *supra* note 84.

total energy intake.”¹⁰⁸ And it is not just corn subsidies adding to this discrepancy in price between HFCS and refined sugar. The U.S. also imposes tariffs and quotas on imported cane sugar,¹⁰⁹ further exacerbating the relative price differences between HFCS and other forms of sugar and stimulating the market toward greater dependences, innovations, and markets of scale involving HFCS and other corn-derived sugars.

The Institute for Agriculture and Trade Policy’s 2006 study, *Food Without Thought: How U.S. Farm Policy Contributes to Obesity*, used data from the USDA Economic Research Service (ERS) to document a number of changes in U.S. food consumption.¹¹⁰ One of their most significant findings, as reported by the New York Times, is that, “[b]etween 1985 and 2000, the cost of [unsubsidized] fresh fruits and vegetables increased nearly 40% while the price of soft drinks [the main ingredient of which is corn-based HFCS] decreased by almost 25%, adjusted for inflation.”¹¹¹ Fast food and supermarket nutrition studies have similarly shown that while one dollar buys “1,200 calories of potato chips and cookies . . . the same dollar buys only 250 calories . . . [of] a whole food like carrots.”¹¹² In the same period, between 1997 and 2003, the average cost of vegetables increased by 17%, while the cost of a Big Mac went down by 5.4%, and the cost of a bottle of Coca-Cola decreased by 35%.¹¹³ William Eubanks discussed these sorts of findings in his comprehensive article on the negative economic effects of the Farm Bill and drew the following conclusion:

¹⁰⁸ Kiyah J Duffey and Barry M Popkin, High-fructose corn syrup: is this what's for dinner?, *American Society for Clinical Nutrition*, Vol. 88, No. 6, (Dec. 2008), available at <http://www.ajcn.org/content/88/6/1722S.abstract>.

¹⁰⁹ James Bovard, *The Great Sugar Shaft*, Apr. 1998, available at <http://www.fff.org/freedom/0498d.asp>.

¹¹⁰ Heather Schoonover & Mark Muller, *Inst. for Agric. & Trade Pol’y, Food Without Thought: How U.S. Farm Policy Contributes to Obesity* 6 (2006), available at <http://www.healthobservatory.org/library.cfm?RefID=80627>.

¹¹¹ Marian Burros, *The Debate Over Subsidizing Snacks*, *New York Times* (July 4, 2007). Available at: <http://www.nytimes.com/2007/07/04/dining/04farm.html>.

¹¹² Michael Pollan, *The Omnivore's Dilemma*, *supra* note 93, at 107-08.

¹¹³ Laurence Lessig, *Citizens: The Need and the Requirements—Our Nation Desperately Needs Citizens*, *supra* note 84.

“Thus, food products highly subsidized under the Farm Bill such as HFCS-laden sodas, candy, and other unhealthy processed foods actually saw their supermarket prices decrease as a result of subsidy-propelled market distortion, while unsubsidized fruits and vegetables saw a spike in price. It is quite clear where consumer choice went as a result of the inequitable system that makes unhealthy sodas cheap and nutritious food expensive.”¹¹⁴

The combined facts that the Farm Bill stimulates the production of cheap corn-derived sugars while doing little to support farmers growing fresh produce help explain growing price gap between healthy and unhealthy foods.¹¹⁵ While acknowledging that some critics of the corn subsidy, such as Michael Pollan, “might be overstating” the causal link to the price of HFCS, an independent study by researchers at the Tufts University Global Development and Environment Institute made the following findings:

“U.S. farm policy effectively lowered corn prices and HFCS production costs, offering HFCS producers an implicit subsidy of \$243 million a year, a savings of \$2.2 billion over the nine-year period, and over \$4 billion since 1986. For soda bottlers, the main consumers of HFCS and among those most heavily implicated in public health concerns, the savings amounted to nearly \$100 million per year, \$873 million over the nine-year period, and nearly \$1.7 billion since the wholesale adoption of HFCS by the soda industry in the mid-eighties.”¹¹⁶

The USDA has similarly recognized that increasing the price of HFCS-sweetened products would lead to significant reductions in consumption.¹¹⁷ While consumption taxes could begin to accomplish that objective, eliminating the active indirect subsidization of HFCS production offers either an alternative or a supplemental means of reducing

¹¹⁴ William S. Eubanks II. *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 Stan. Envtl. L.J. 213 (2009).

¹¹⁵ Michael Pollan, “You Are What You Grow,” in *MANIFESTOS ON THE FUTURE OF FOOD & SEED*, ed. Vandana Shiva, South End Press, Cambridge, MA at 134-135 (2007).

¹¹⁶ Alicia Harvie and Timothy A. Wise, *Sweetening the Pot: Implicit Subsidies to Corn Sweeteners and the U.S. Obesity Epidemic*, *supra* note 84 at 4.

¹¹⁷ Travis A. Smith, Biing-Hwan Lin, and Rosanna Morrison, *Taxing Caloric Sweetened Beverages To Curb Obesity*, *Amber Waves: The Economics of Food, Farming, Natural Resources, & Rural America*, Sept. 2010, available at <http://www.ers.usda.gov/AmberWaves/September10/Features/TaxingCaloricBeverages.htm> (“ERS researchers found that a 20-percent tax on caloric sweetened beverages could reduce consumption, calorie intake, and body weight even after accounting for increased consumption of alternative beverages.”).

consumption,¹¹⁸ and cutting subsidies would avoid some of the political opposition that would almost certainly accompany any proposed consumption tax.

C. The Effect of Commodity Subsidies on Diet, Nutrition, and Healthcare Costs

The problem is not just that corn-based products are relatively cheaper than competitors as a result of subsidy payments. These foods are often less healthy as well.¹¹⁹ Michael Pollan states this quite poignantly where he writes, "Absurdly, while one hand of the federal government is campaigning against the epidemic of obesity, the other hand is actually subsidizing it, by writing farmers a check for every bushel of corn they can grow."¹²⁰ In part because of these subsidies, farmers in the US produce 500 more calories per person every day than did in the early 1970s, and Americans consume an additional 200 of those calories.¹²¹ And many of those calories are from corn,¹²² corn-fed animal products,¹²³ or from high fructose corn syrup specifically.¹²⁴ "Studies suggest that we metabolize high fructose corn syrup differently than ordinary sugar, and consumption of high fructose corn syrup is a major factor in weight gain."¹²⁵ There is also some evidence

¹¹⁸ A recent study of the implicit subsidy to HFCS manufacturers found that "[i]f corn had been priced at its true cost, HFCS-55 prices (the major sweetener for soft drinks) would have been an estimated 8.8% higher..." Alicia Harvie and Timothy A. Wise, *Sweetening the Pot: Implicit Subsidies to Corn Sweeteners and the U.S. Obesity Epidemic*, *supra* note 84 at 4 (citing Beghin, J. C., Jensen, Helen H. (2008). *Farm Policies and Added Sugars in US Diets*. Ames, Iowa, Center for Agricultural and Rural Development (CARD), Iowa State University).

¹¹⁹ Specifically, high-fructose corn syrup and corn as animal feed have reduced the manufacturing costs for soda, snacks like chips and candy bars, and meat. These lowered costs result in lower prices for consumers and encourage consumption in excess of a free-market equilibrium. See *supra*, Section II, Part B.

¹²⁰ Michael Pollan, *The (Agri)Cultural Causes of Obesity*, in Willie Nelson, *FARM AID: A SONG FOR AMERICA*, Rodale Books 157 (August 25, 2005).

¹²¹ Michael Pollan, *THE OMNIVORES DILEMMA*, *supra* note 93 at 103.

¹²² What Are We Eating? What the Average American Consumes in a Year, Visualize Economics, available at http://www.visualizeeconomics.com/food-consumption-in-america_2010-07-12/ (citations omitted).

¹²³ *Id.*

¹²⁴ Dana Burnett, *High Fructose Corn Syrup: How much do you consume?*, Jan. 11, 2011, *Healthy Aging Review*, available at <http://healthyagingreview.com/?p=960> ("On average, Americans consume 132 calories of HFCS each day. The top 20 percent of HFCS consumers eat over 300 calories daily.").

¹²⁵ Eric Schlosser, Forward to Anna Lappe & Bryant Terry, *GRUB: IDEAS FOR AN URBAN ORGANIC KITCHEN*, at 35 (2006).

that HFCS does send the same satiety signals to the brain as sugar consumption.”¹²⁶ To make matters worse, the way in which HFCS is metabolized by the liver raises additional health concerns and “can result in higher levels of triglycerides, which are associated with heart disease and stroke.”¹²⁷

In a major 2004 study about the relationship between food costs and obesity, the epidemiologist Adam Drewnowski demonstrated that price distortions are having a significant, and overwhelmingly negative affect on what Americans eat.¹²⁸ “[D]iets based on refined grains, added sugars, and added fats are more affordable than the recommended diets based on lean meats, fish, fresh vegetables, and fruit.”¹²⁹ Pollan summarized these findings, writing, “Drewnowski concluded that the rules of the food game in the U.S. are organized in such a way that if you are eating on a budget, the most rational economic strategy is to eat badly—and get fat.”¹³⁰ As described above, subsidies have reduced the real cost consumers pay for a range of sugar- and fat-laden products, while healthier foods such as unprocessed fruits and vegetables have seen significant real price increases.¹³¹ Changes in relative prices, in no small way attributable to government subsidies for corn and soybeans, are affecting how Americans eat for the worse, even undercutting the USDA’s own dietary guidelines.¹³²

¹²⁶ Barbara L. Atwell, *Obesity, Public Health, and the Food Supply*, 4 Ind. Health L. Rev. 3, 13 (2007) (citing Sharon S. Elliott et al., Fructose, Weight Gain, and the Insulin Resistance Syndrome, 76 Am. J. Clinical Nutrition 911, 911-22 (2002)).

¹²⁷ Barbara L. Atwell, *Obesity, Public Health, and the Food Supply*, 4 Ind. Health L. Rev. 3, 13 (2007).

¹²⁸ Drewnowski Adam. “Obesity and the food environment: dietary energy density and diet costs.” American Journal of Preventative Medicine 2004; 27(3S): 154-162. Reprinted in: An Economic Analysis of Eating and Physical Activity Behaviors: Exploring Effective Strategies to Combat Obesity (eds J.O. Hill, R. Sturm, C.T. Orleans)

¹²⁹ Id.

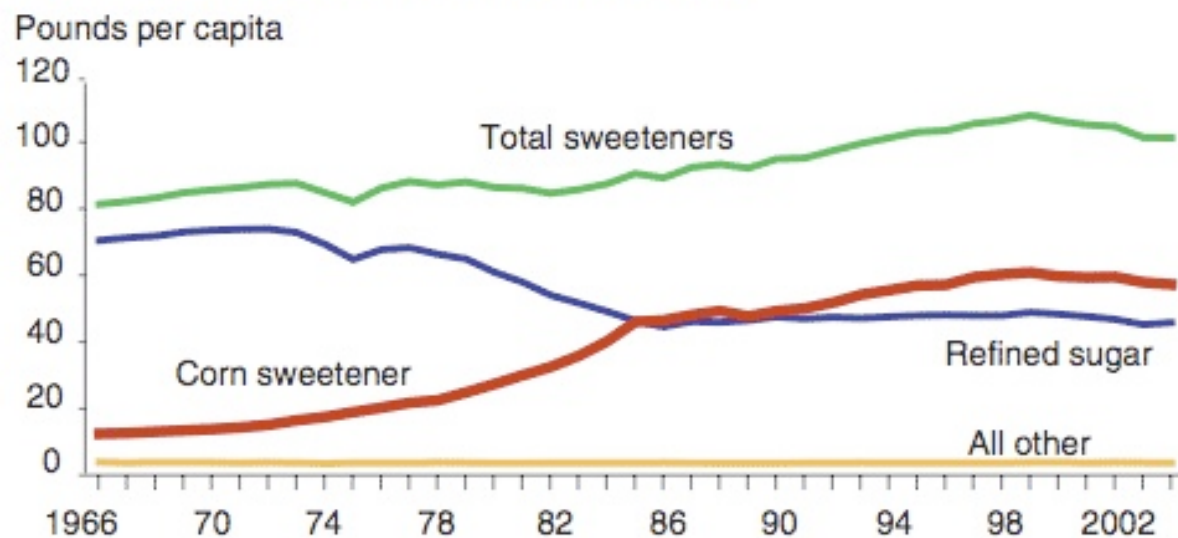
¹³⁰ Michael Pollan, “You Are What You Grow,” in Manifestos on the Future of Food & Seed, ed. Vandana Shiva, South End Press, Cambridge, MA (2007).

¹³¹ See supra notes 111-115 and accompanying text.

¹³² United States Department of Agriculture, The Food Guide Pyramid 2, 4-6, 8, 27 (1996), available at

These price differences correspond to predictable increases in the consumption of calories from corn-derived foods high in fats and simple sugars.¹³³ The following graph from USDA Economic Research Service demonstrates just how significant the rise of cheap HFCS has been in increasing overall sugar consumption in the United States:¹³⁴

Estimated per capita sweetener consumption, total and by type of sweetener, 1966-2004



Source: USDA.

Benforado, Hanson, and Yosifon have explained the “causal chain,” as follows: “subsidies lowered the cost of corn; cheap corn lowered the cost of sweet, processed foods; lower

<http://www.usda.gov/cnpp/pyrabklt.pdf>.

¹³³ “Many consumers choose the most cost-effective means of obtaining necessary calories, which unfortunately is found in unhealthy foods because of price distortion under the Farm Bill.” William Eubanks, *A Rotten System*, supra note 114 at 288.

¹³⁴ See Richard A. Forsheea; Maureen L. Storeya; David B. Allisona; Walter H. Glinsmann; Gayle L. Heina; David R. Linebacka; Sanford A. Millera; Theresa A. Nicklasa; Gary A. Weavera; John S. Whitea. *A Critical Examination of the Evidence Relating High Fructose Corn Syrup and Weight Gain*, *Critical Reviews in Food Science and Nutrition*, 47:561-583 (2007) (concluding that “HFCS does not appear to contribute to overweight and obesity any differently than do other energy sources); see also Tom Philpott, *Why are we propping up corn production again?*, supra note 96.

prices on things like soda increased consumption; and consuming more of these types of foods made us gain weight.”¹³⁵

Consumption of corn-based HFCS beverages has been linked to greater weight gain and increased risk Type 2 diabetes in women.¹³⁶ Health professionals also recognize that “calories from those subsidized foods are partly responsible for the epidemic of childhood obesity and the increased incidence of diabetes.”¹³⁷ Over half of all newly diagnosed diabetes cases since 1980 are in people under the age of 18, a rate that was unthinkable a few decades earlier.¹³⁸ Industry groups, such as the Corn Refiners Association assert that HFCS is no more harmful than cane sugar,¹³⁹ although studies by the American Medical Association continue to emphasize the need for continued epidemiological studies.¹⁴⁰ Irrespective of that debate and the relative harms of cane sugar and HFCS, there is overwhelming and indisputable evidence that HFCS has contributed to a major increase in the overall consumption of high-calorie sweeteners and a corresponding increase in diabetes, obesity, and other weight-related health issues.¹⁴¹

¹³⁵ Benforado, Hanson, and Yosifon, Broken Scales, *supra* note 105 at 1794.

¹³⁶ Frequent Consumption of Sugar-Sweetened Beverages Linked to Greater Weight Gain and Type 2 Diabetes in Women, Press Release (Aug. 24, 2004), available at <http://www.hsph.harvard.edu/news/press-releases/archives/2004-releases/press08242004.html>. See also Frank B. Hu, MD Sugar-Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women, *Journal of American Medical Association*, Aug. 25, 2004; 292(8): 927-934.

¹³⁷ Marian Burros, The Debate Over Subsidizing Snacks, *New York Times*, July 4, 2007, available at: <http://www.nytimes.com/2007/07/04/dining/04farm.html>.

¹³⁸ Laurence Lessig, Citizens: The Need and the Requirements—Our Nation Desperately Needs Citizens, *supra* note 84.

¹³⁹ See, e.g. Registered Dietitians share their views about High Fructose Corn Syrup, SweetSurprise.com, the official website of the Corn Refiners Association, <http://www.sweetsurprise.com/experts-on-hfcs/dietitians>.

¹⁴⁰ Report 3 of the Council on Science and Public Health (A-08), The Health Effects of High Fructose Syrup, available at <http://www.ama-assn.org/ama1/pub/upload/mm/443/csaph3a08-summary.pdf>.

¹⁴¹ George Bray, Samara Nielsen, and Barry Popkin, Consumption of high-fructose corn syrup in beverages may play a role in the epidemic of obesity. The Pennington Biomedical Research Center, *American Journal of Clinical Nutrition*, Vol. 79, No. 4, 537-543, April 2004.

By some estimates, healthcare costs for obesity and for weight-related diabetes exceed \$147 billion annually.¹⁴² The Society of Actuaries Committee on Life Insurance Research believes the actual total costs are far higher.¹⁴³ Beyond diabetes, obesity contributes to risk for heart disease, stroke, in addition to a number of costs associated with mobility and increased morbidity.¹⁴⁴ “We estimate that total annual economic cost of overweight and obesity in the United States and Canada caused by medical costs, excess mortality and disability is approximately \$300 billion in 2009.”¹⁴⁵ A 2006 study revealed that obese patients spent an average of \$1,429 more for their medical care than did people within a normal weight range,¹⁴⁶ and increasingly these costs are footed by taxpayers through government healthcare programs.¹⁴⁷ In his article, *A Rotten System*, William Eubanks describes how deeply corn subsidies undercut the needs of our health care system: “as taxpayers, we are paying agribusiness and food processors through Farm Bill subsidies and then turning around and spending more tax dollars on the rising health care costs driven by the same agribusiness and food processing giants that stock our shelves with unhealthy food.”¹⁴⁸

D. The Environmental Costs and Ecological Impact of Commodity Subsidies

¹⁴² Laurence Lessig, Citizens: The Need and the Requirements—Our Nation Desperately Needs Citizens, *supra* note 84. See also Anderson JW, and Jhaveri MA. “Reductions in medications with substantial weight loss with behavioral intervention.” *Curr Clin Pharmacol.* 1;5(4):232-8 Nov. 2010.

¹⁴³ Donald F. Behan and Samuel H. Cox, Obesity and its Relation to Mortality and Morbidity Costs, Society of Actuaries Committee on Life Insurance Research, (Dec. 2010), available at <http://www.soa.org/files/pdf/research-2011-obesity-relation-mortality.pdf>.

¹⁴⁴ See, e.g., Prevention Makes Common Cents, U.S. Department of Health and Human Services, available at <http://aspe.hhs.gov/health/prevention/prevention.pdf>.

¹⁴⁵ *Id.*

¹⁴⁶ Diana Holden, Fact Check: The cost of obesity, CNN Fit Nation, Feb. 9, 2010. Available at <http://www.cnn.com/2010/HEALTH/02/09/fact.check.obesity/index.html>.

¹⁴⁷ Scott Fields, The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?, *Envtl. Health Perspectives*, Oct. 2004, available at <http://www.medscape.com/viewarticle/491630>.

¹⁴⁸ William Eubanks, *A Rotten System*, 28 *Stan. Env'tl. L.J.* at 234, *supra* note 114.

“[I]ndustrialized commodity crop farming is putting strains on natural systems.”¹⁴⁹ Corn production is an extremely land- and resource-dependent industry, and as John Mackay wrote, “By focusing solely on making food as cheap as possible, we have often overlooked the grave environmental costs—which will some day be hard economic costs.”¹⁵⁰ Not all of these costs are deferred, however. The corn industry’s dependence on fossil fuels, for example, produces both long-term externalities, and in the short-term adds to the cost of gasoline and adds risk to the agricultural sector by linking food costs to the cost of oil. Gareth Collins has further documented that “[m]odern farming practices contribute heavily to environmental problems like water pollution, hypoxia zones, biodiversity loss, and soil erosion.”¹⁵¹ Le Seur and Abelkop have noted the difficulty parsing apart the environmental burdens or tracing them directly to individual commodities like corn:

It would be too massive an undertaking to catalog all of the socioeconomic, public health, and environmental impacts to which commodity subsidies contribute. It is also an oversimplification to assign specific impacts to commodity subsidies, which are interlocking pieces in a more complex market reality. Such analysis is the proper role of the EIS.¹⁵²

For precisely this reason, I have not attempted to offer an exhaustive list or to make any exacting attributions here. There is considerable research available about many of the most salient environmental harms associated with American agricultural subsidies, and this Part is meant to provide only a brief introduction.

¹⁴⁹ Gareth Collins, Ending Corn Subsidies: A Small Step Toward Sustainable Farm Policy, In Midwest 2.0, The Roosevelt Institute, 29, 30, (March 2010).

¹⁵⁰ John Mackey, Taxpayers, chapter in Gristle: from Factory Farms to Food Safety (Thinking Twice About the Meat We Eat), edited by Moby with Miyun Park, The New Press: New York (2010).

¹⁵¹ Gareth Collins, Ending Corn Subsidies: A Small Step Toward Sustainable Farm Policy, *supra* note 149 at 30.

¹⁵² Carrie Lowry La Seur and Adam D.K. Abelkop, Forty Years After NEPA’s Enactment, It Is Time for a Comprehensive Farm Bill Impact Statement, HARVARD L. & POLICY REV. 201, 204 (2010).

Growing corn turns out to be extremely energy inefficient as it is currently practiced. Michael Pollan described the extent to which this biological process that can convert sunlight into stored energy in the form of food has, through perverse industrial systems, actually come to require more fossil fuel inputs than the energy actually contained in the food.¹⁵³ Consider the following excerpt:

“When you add together the natural gas in the fertilizer to the fossil fuels it takes to make the pesticides, drive the tractors, and harvest, dry, and transport the corn, you find that every bushel of industrial corn requires the equivalent of between a quarter and a third of a gallon of oil to grow it—or about fifty gallons of oil per acre of corn. (Some estimates are higher.) Put another way, it takes more than a calorie of fossil fuel energy to produce a calorie of food; before the advent of chemical fertilizer the Naylor farm produced more than two calories of food energy for every calorie of energy invested. From the standard of industrial efficiency, it’s too bad we can’t simply drink the petroleum directly.”¹⁵⁴

For the reasons described in the Sections above, the federal subsidy encourages fencerow-to-fencerow production, incentivizing fertilizer dependence, oil-dependent industrial farming techniques, and does not provide farmers any incentive to rotate crops to take advantage of natural efficiencies. And without pressure to keep costs below the market price, farmers’ dependency on fossil fuels is encouraged even beyond the already unsustainable levels stipulated through market pricing mechanisms.

Millions of acres of conservation land have already been diverted to corn production,¹⁵⁵ and researchers have projected that as many as 2.9 million additional acres may be diverted to meet short-term demand for ethanol.¹⁵⁶ Sections of the Farm Bill are

¹⁵³ Micael Pollan, *The Omnivores Dilemma*, *supra* note 93 at 45.

¹⁵⁴ *Id.* at 45-46.

¹⁵⁵ La Seur and Abelkop, *Forty Years After NEPA’s Enactment, Time for a Comprehensive Farm Bill Impact Statement*, *supra* note 152 at 205.

¹⁵⁶ See Joshua A. Byrge and Kevin L. Kliesen, *Ethanol: Economic Gain or Drain?*, *Regional Economist*, at pp. 5,7, July 2008, available at <http://www.stlouisfed.org/publications/re/2008/c/pdf/ethanol.pdf>.

often at cross-purposes with respect to land conservation. In 2002, for example, the Farm Bill reintroduced counter cyclical (i.e. deficiency) payments for corn, grain, and other commodities, which stimulate increased production, and at the same time set aside nearly \$22 billion for expanded conservation programs, which led the New York Times to write that “the [2002] farm bill could become the most sweeping environmental legislation since the Clean Air Act of 1990.”¹⁵⁷

Somewhat surprisingly, the USDA has never been required to offer a full environmental impact statement (EIS) for its implementation of most major farm bill policies.¹⁵⁸ The National Environmental Policy Act of 1969 (NEPA) requires an EIS before the enactment of any “legislation and all other major Federal actions significantly affecting the quality of the human environment.”¹⁵⁹ But, as Le Seur and Abelkop have demonstrated, the USDA has only made segmented attempts at NEPA compliance even as “the scope and ecological impact of the Farm Bills have swelled in recent decades.”¹⁶⁰ While the environmental harms listed in the preceding paragraphs are by no means exhaustive, the fossil-fuel dependence of subsidized corn producers, the indirect subsidization of resource intensive meat production, soil erosion, water pollution and other aquatic degradation, greenhouse gas (GHG) emissions, and the diversion of land designated for conservation are all variously implicated in our current commodity support systems. Le Seur and Abelkop have noted the difficulty parsing apart the environmental burdens or tracing them directly

¹⁵⁷ Elizabeth Becker, Senate Passes \$44.9 Billion Farm Bill Limiting Subsidies, *supra* note 66.

¹⁵⁸ La Seur and Abelkop, Forty Years After NEPA’s Enactment, It Is Time for a Comprehensive Farm Bill *supra* note 152 at 202.

¹⁵⁹ National Environmental Policy Act of 1969, 42 U.S.C. Sec. 4332(2)(C) (2006).

¹⁶⁰ Carrie Lowry La Seur and Adam D.K. Abelkop, Forty Years After NEPA’s Enactment, It Is Time for a Comprehensive Farm Bill Impact Statement, HARVARD L. & POLICY REV. 201, 202 (2010).

to individual commodities like corn, but, they emphasize, the USDA is the agency that has a statutory mandate to begin making this effort.¹⁶¹

E. Destabilizing Effects on International Food Prices and Global Labor Markets

An astounding 41.9% of the world's corn is grown in the United States.¹⁶² Much of that corn is consumed domestically, converted into ethanol, or dedicated to meat production or other secondary manufacturing products such as HFCS, plastics, etc. However, a large portion of corn is exported and has a significant effect on the global price. The USDA ERS reported the United States' share of world corn exports averaged in excess of 60 percent between 2003 and 2008.¹⁶³ In 2010, the U.S. exported more than four times more corn than the second largest corn exporter, Argentina.¹⁶⁴ The predictable result of the U.S. saturation of the global market in corn is the depression of corn prices, and this is precisely what has come to pass.¹⁶⁵ And while this produces tangible benefits and lowers costs for consumers and international producers who rely on corn, that's not the end of the story.

Perhaps the single most cited harm that results from the suppression of agricultural prices is the disruption of family and community farming practices in other parts of the world. Families throughout Africa, Asia, and Latin America that have grown food for generations are no longer able to earn a sustainable income. Regardless of what crops

¹⁶¹ La Seur and Abelkop, Time for a Comprehensive Farm Bill Impact Statement, *supra* note 152.

¹⁶² World of Corn 2010: Meeting the Challenge of Production. National Corn Growers Association 2010, available at <http://ncga.com/files/pdf/worldofcorn2010.pdf>.

¹⁶³ ERS USDA Briefing Room, Corn: Trade, available online at <http://www.ers.usda.gov/Briefing/corn/trade.htm> (last visited March 21, 2011).

¹⁶⁴ Agriculture Statistics > Grains > Corn exports (most recent) by country, NationMaster http://www.nationmaster.com/red/pie/agr_gra_cor_exp-agriculture-grains-corn-exports.

¹⁶⁵ See Uncle Sam's Teat: Can America's farmers be weaned from their government money?, The Economist, Sep. 7th 2006, available at <http://www.economist.com/node/7887994> ("America's farm subsidies, unlike Europe's, have become more, rather than less, trade-distorting. Most of the direct cash is lavished on crops, particularly corn (maize), soyabeans, rice, cotton and wheat, often depressing world prices.").

these farmers were growing, the abundance of artificially cheap American corn reduces demand for their crops to be consumed in their own country, either directly or as feed or another industrial input. The New York Times, reporting on the devastating impact that 'free-trade' agreements and entry into the WTO produced had in the Philippines where farmers were unable to compete with subsidized American agribusiness:

"Instead of making any gains, the Philippines has lost hundreds of thousands of farming jobs since joining the W.T.O. Its modest agricultural trade surpluses of the early 1990's have turned into deficits. Filipinos...increasingly view the much-promoted globalization as a new imperialism. Despair in the countryside feeds a number of potent anti-government insurgencies."

A number of international human rights and labor advocates attempted to give voice to those suffering under this situation in a book called *Manifestos on the Future of Food & Seed*, underscoring, among other things, how crucial the political economy of food remains among many of the world's people.¹⁶⁶ The problem goes far beyond simply putting strain on family farmers and indigenous populations. Displacing farmers swells the number of unemployed, and foreclosed-on farmers then come to the cities with their families, fill urban ghettos, and contribute to political and social unrest. As Michael Pollan observed,

"By making it possible for American farmers to sell their crops abroad for considerably less than it costs to grow them, the farm bill helps determine the price of corn in Mexico and the price of cotton in Nigeria and therefore whether farmers in those places will survive or be forced off the land, to migrate to the cities—or to the U.S."¹⁶⁷

Nobel Prize-winning economist Joseph Stiglitz has also written on the devastating distortions to third-world prices that subsidies, noting that U.S. prices reduce farm incomes

¹⁶⁶ Vandana Shiva (ed.), *Manifestos on the Future of Food & Seed*, South End Press (October 1, 2007).

¹⁶⁷ Michael Pollan, "You Are What You Grow," in *MANIFESTOS ON THE FUTURE OF FOOD & SEED*, ed. Vandana Shiva, South End Press, Cambridge, MA at 136 (2007).

around the world and make it harder for farmers to sustain themselves and their families.¹⁶⁸

This is not just a problem in the abstract. The U.N. and a number of its trade partners have at various times indicated their dissatisfaction with U.S. subsidies, and these programs have been characterized as protectionist, disruptive to free trade, and even, at times, as outright harmful.¹⁶⁹ The WTO, for instance, authorized sanctions against the United States for damages its subsidy programs caused to farmers in Brazil.¹⁷⁰ “West Africa was similarly devastated by declining cotton prices spurred by American cotton subsidies which led West African farmers to state, ‘[t]he more we produce, [t]he more we export, [t]he poorer we get.’”¹⁷¹ William Eubanks summarized the emerging global consensus regarding the U.S. subsidy program as follows: “Developing nations and international institutions such as the World Bank have placed increased pressure on the United States and the European Union to phase out agricultural export subsidies over the past decade, but developed nations have made few efforts to eliminate such subsidies.”¹⁷²

International agricultural markets, insurance systems, and recent financial product innovations may provide some safeguard against seasonal and regional risk, and domestic grain shortages are far less of a danger to any one nation’s food supply than in

¹⁶⁸ “When subsidies lead to increased production with little increase in consumption, as is typical with agricultural commodities . . . [the result is] lower prices for producers, lower incomes for farmers, and more poverty among poor farmers in the Third world.” William Eubanks, *A Rotten System*, supra note 114 at 234 (Citing Joseph Stiglitz, *The Tyranny of King Cotton*, (Oct. 8, 2006), available at <http://www.project-syndicate.org/commentary/stiglitz76>; Daniel Imhoff, *Food Fight: The Citizen's Guide to a Food and Farm Bill* 33, 72-73 (2007)).

¹⁶⁹ EU joins WTO complaint against U.S. corn subsidies, supra note 72.

¹⁷⁰ *Id.*

¹⁷¹ William Eubanks, *A Rotten System*, 28 *Stan. Envtl. L.J.* at 234, supra note 114 at 234 (citing Daniel Imhoff, “Food Fight: The Citizen's Guide to a Food and Farm Bill,” 33 at 74, 79 (2007)).

¹⁷² *Id.*

previous decades.¹⁷³ These same financial innovations, however, have resulted in a large transfer of wealth to sophisticated institutional investors while making food less accessible.¹⁷⁴ And while the relationships between commodity subsidies, derivatives, and more recent financial product innovations such as long-only index funds can be extremely difficult to parse apart, the United States government's role generates significant moral hazard, contributes to disruptions in traditional market pricing, and further fuels political unrest throughout the developing world.¹⁷⁵ The cost of a spike in food costs, whether driven through speculation or other shocks to international food prices, could cause massive inflation.¹⁷⁶ And while the existence of agricultural subsidies might appear to some to mitigate a rise in prices, that conclusion overlooks the fact that inflation will increase production costs across the board and further ignores that many indigenous farmers have been driven off their land as a result of market-distortive trade policies.

Furthermore, events throughout the Mideast in early 2011 should underscore the extent to which agricultural prices and unemployment more generally can quickly transform into civil unrest significant social uprisings.¹⁷⁷ The hostility and political unrest produced by these price distortions have a significant potential to contribute to anti-

¹⁷³ Risk Management in Agriculture, Towards Market Solutions in the EU, Deutsche Bank Research, Sept. 17, 2010, available at http://www.dbresearch.de/PROD/DBR_INTERNET_EN-PROD/PROD0000000000262553.PDF.

¹⁷⁴ Anthony Kammer, Food Prices, a Speculator Sport?, The Harvard Law & Policy Review Blog: Notice and Comment, Feb. 28, 2011, available at <http://hlpronline.com/2011/02/food-prices-a-speculator-sport/>

¹⁷⁵ Id.; See also Friedrich Kaufman, The Food Bubble: How Wall Street starved millions and got away with it, Haper's Magazine, July 2010, available at <http://frederickkaufman.typepad.com/files/the-food-bubble-pdf.pdf>.

¹⁷⁶ See, e.g., Alex Frangos, How Oil and Food Prices Impact Asia, and Other Economic Tidbits, Wall Street Journal, April 5, 2011, available at <http://blogs.wsj.com/economics/2011/04/05/how-oil-and-food-prices-impact-asia-and-other-economic-tidbits/>.

¹⁷⁷ See, e.g., Fighting Over Food: Soaring food prices are spreading hunger and helping to spark revolutions in the Mideast. Why is food so scarce?, The Week Magazine, Feb. 25, 2011, available at <http://theweek.com/article/index/212433/fighting-over-food>.

American sentiment throughout the rest of the world.¹⁷⁸ Larry Lessig identified the United States' hypocritical 'free-trade' strategy, which combines forcing international enforcement copyright right while simultaneously using corporate welfare subsidies to inundate global agricultural subsidies markets with American commodities, noting "While the US sings the virtues of free trade to defend maximalist intellectual property regulation, we poison the free trade that developing nations care about most—agriculture—by subsidizing farming in the industrialized world to the tune of \$300 billion annually."¹⁷⁹ The WTO, as noted previously, has proposed sanctions against the United States because of these practices, and other nations have, at times, refused to participate in trade negotiations with the U.S.¹⁸⁰

III. U.S. Political Structures Prevent Bad Food Policies from Getting Better

Corn subsidies are an incredibly unpopular policy on both the left and the right. Free-market advocates and libertarians have long decried the market distortions and inefficiencies that corn subsidies create. House Speaker John Boehner has compared the farm bill to a "slush fund."¹⁸¹ Similarly, opposition from liberal and progressive organizations is increasingly vocal and has coalesced around their environmental impact, the unintended healthcare consequences, and the fact that the nation's wealthiest corporations receive a disproportionate share of governmental subsidies.¹⁸² Even the powerful Iowa Farm Bureau Federation, which represents 99 Iowa counties, no longer

¹⁷⁸ See Sanjeev Gupta, Marijn Verhoeven, Robert Gillingham, Christian Schiller, Ali Mansoor, and Juan Pablo Cordoba, *Equity and Efficiency in the Reform of Price Subsidies: A Guide for Policymakers*, International Monetary Fund (IMF), Dec. 2000, available at <http://www.imf.org/external/pubs/ft/equity/index.htm>.

¹⁷⁹ Laurence Lessig, *A Taste of Our Own Poison: A modest proposal: Hold Hollywood hostage till we kill farm subsidies*, Wired Magazine, Issue 12.01, Jan. 2004, available at <http://www.wired.com/wired/archive/12.01/view.html?pg=5>.

¹⁸⁰ Id.

¹⁸¹ Mark Bittman, *Don't End Agricultural Subsidies, Fix Them*, NY Times Opinion Pages (Mar. 1, 2011), available at <http://opinionator.blogs.nytimes.com/2011/03/01/dont-end-agricultural-subsidies-fix-them/>.

¹⁸² See, e.g. William Eubanks, *A Rotten System*, supra note 114 at 233 (Citing Daniel Imhoff, *Food Fight: The Citizen's Guide to a Food and Farm Bill* 33 (2007)).

supports federal direct payments to farmers.¹⁸³ What can possibly explain the persistence of such a harmful and unpopular law?

Legislative drift—the process by which legislation grows out-of-touch with its original purposes—is central to any honest attempt to answer this question. Emergency subsidies made sense as measures to stabilize price and supply of corn and other grains during the Great Depression and the shortages of the 1970s, but these emergency measures have become ingrained in our bureaucracies and national administrative practices. The conditions under which this legislation was passed continue diverging from the environmental and public health realities we now confront. And despite the bill’s ever escalating irrelevance to our current social predicaments, the USDA, EPA, FDA, and other agencies—and increasingly Congress itself—are hamstrung in their ability to eliminate or modify our system of crop subsidization and its consequences in accordance with reasonable and widely shared public policy objectives. On top of the legislative and regulatory fragmentation, lobbying and campaign finance rules have played a vital role in propping up this broken system. As historian Burton Fulson wrote, the subsidy survived, “[n]ot because it worked well, but because farmers lobbied to keep it.”¹⁸⁴ President George W. Bush actually threatened to veto the most recent Farm Bill in 2008 for unfairly redistributing tax money and distorting public trade, but the Senate rejected subsidy caps and responded to the veto threat with a 79-14 vote in favor of the existing form.¹⁸⁵ Incidents such as this give rise to a serious concern that senators’ dependence on campaign

¹⁸³ Dan Piller, Iowa Farm Bureau: end direct payments (Sep. 3, 2010), <http://blogs.desmoinesregister.com/dmr/index.php/2010/09/03/iowa-farm-bureau-end-direct-payments/>.

¹⁸⁴ Burton Folsom, Jr., F.D.R.’s Disastrous Experiment, The New York Times, Room for Debates, Nov. 21, 2010, available at <http://www.nytimes.com/roomfordebate/2010/11/21/do-farm-subsidies-protect-national-security/fdrs-disastrous-experiment>.

¹⁸⁵ Alan Bjerga, Senate Approves Farm Bill Over Bush Veto Threat, *supra* note 73.

contributions and lobbying money matters more than the policy preferences of their constituency and even more than party loyalties.

The persistence of this legislation can actually shine some light into the most intractable problems in the current functioning of our political and governmental institutions. A clear understanding of these political and structural problems is necessary for understanding why the United States persists in propping up a broken system. And perhaps more importantly, understanding and reacting to the political structures of our time are critical aspects of moving past a descriptive account of the Farm Bill's negative impact and effectively organizing the interests affected. While admittedly the concerns I address in this Section are interrelated, I have divided this analysis into three parts. Part A addresses the narrowness of the statutory authority given the relevant agencies to implement food policy and the coordination problems that regulatory balkanization have produced in this area. Part B considers the structural features of Congress and the Senate, including the Congressional committee system, which, in the context of Farm Bill legislation, lead to the overrepresentation of the concerns of the agricultural sector at the expense of the public health, environmental, and other economic considerations. Part C postulates that lobbying and campaign fund-raising, taken in conjunction with the other structural features of Congress have made effective legislation in this area less probable.

A. Agency Fragmentation, Regulatory Capture, & the Illusion of a Food Policy

As described briefly in Section I, Part A above,¹⁸⁶ the balkanized and fragmented structure of the food regulatory system has been cited as a major impediment to effective

¹⁸⁶ See footnotes 16-19 and surrounding text.

government action and to the development of more reasonable food policy.¹⁸⁷ The administrative structure of our government has partitioned agricultural policy, energy policy, environmental and healthcare across several agencies, and has provided insufficient resolution or coordination mechanisms. Even more remarkably, a single issue can often be spread over multiple agencies in a baroque, almost indecipherable manner.¹⁸⁸ The practice of splintering responsibility and of treating interrelated and overlapping issues as though they are discrete produces inconsistency across agencies, duplicates activities, and enhances coordination costs. This diminishes accountability, and more subtly, it places blinders around administrators and limits the possible factors and courses of action that any one agency can take into consideration.¹⁸⁹

A cross-agency resolution mechanism would offer one possible fix, but such an approach would likely encounter administrative law problems and, to the extent that considerable power were transferred, would likely face resistance in Congress.¹⁹⁰ Alternatively, Congress could, as a number of scholars and organizations have recommended in the context of food-safety laws, consolidate agency responsibility into a single food-regulatory entity that is capable of making the necessary policy determinations

¹⁸⁷ See Mike King, Seal Cracks in Food Safety System, ATLANTA J.-CONST., Nov. 7, 2006; U.S. GEN. ACCOUNTING OFFICE, GAO/T-RCED-99-256, U.S. Needs a Single Agency to Administer a Unified, Risk-Based Inspection. System 2 (1999). *Cf.* Reforming the Food Safety System: What if Consolidation Isn't Enough?, 120 Harv. L. Rev. 1345 (2007).

¹⁸⁸ Consider, for example that food safety system alone is "composed of fifteen federal agencies that work under thirty foundational statutes." *Reforming the Food Safety System: What if Consolidation Isn't Enough?*, supra note 17 at 1345-46 (citations omitted).

¹⁸⁹ Id. See also U.S. Gen. Accounting Office, GAO/RCED-91-1B, Food Safety and Quality: Who Does What in the Federal Government 4 (1990).

¹⁹⁰ Compare the criticisms that were made of the Financial Stability Oversight Council contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173), which contains representatives from fifteen government entities. See, e.g. Testimony on the Financial Stability Oversight Council by Robert Cook, Director, Division of Trading and Markets on behalf of Mary L. Schapiro, Securities and Exchange Commission, available at <http://www.sec.gov/news/testimony/2011/ts041411rc.htm> ("[A]s Dodd-Frank implementation proceeds, the coordination of the FSOC agencies will continue to be a vital consideration.")

and of taking necessary steps toward effective implementation.¹⁹¹ Another approach would be to follow the model of statutes such as NEPA, which was described above, and mandate that agencies consult and take into account certain relevant factors before proceeding with their implementation strategies.¹⁹² NEPA itself required environmental considerations be taken into account by all government agencies, but as litigation eventually revealed, courts treated such statutes as a procedural requirement like those imposed under the Administrative Procedure Act and not as a guarantee of any substantive outcome.¹⁹³ In other words, even if the USDA conducted a full environmental impact analysis of its subsidy programs under NEPA like Le Seur and Abelkop propose, it would impose no substantive legal requirement to desist from any of the environmental harms it identified.¹⁹⁴ At present, there is no requirement that the USDA take into account the back-end healthcare costs that are created through its existing commodity programs, but if NEPA litigation offers any guidance, such a requirement would have to assume a different statutory framework.

Closely related to this problem of fragmentation is the degree of internal constraint imposed by the USDA's statutory obligations. By separating nutrition guidelines from

¹⁹¹ In the context of food safety laws, *see, e.g.*, Stuart M. Pape et al., *Food Security Would Be Compromised by Combining the Food and Drug Administration and the U.S. Department of Agriculture into a Single Food Agency*, 59 Food & Drug L.J. 405, 405 (2004); Press Release, Center for Science in the Public Interest, *Too Many Chefs in the Food-Safety Kitchen?* (Oct. 7, 2004). *C.f. Reforming the Food Safety System: What if Consolidation Isn't Enough?*, *supra* note 17. Compare the calls and proposals for consolidation of financial regulation consolidation following the recent 2008 financial crisis. For an introduction to this debate, *see*, Howell Jackson, "A Pragmatic Approach to the Phased Consolidation of Financial Regulation in the United States," Harvard Public Law Working Paper No. 09-19, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1300431.

¹⁹² *See supra* footnotes 158-165 and surrounding text; National Environmental Policy Act of 1969, 42 U.S.C. Sec. 4332 (2006).

¹⁹³ *Id.*; *Calvert Cliffs v. Atomic Energy Commission*, 449 F.2d 1109 (DC Cir. 1971); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

¹⁹⁴ *Id.* *See* Carrie Lowry La Seur and Adam D.K. Abelkop, *Forty Years After NEPA's Enactment, It Is Time for a Comprehensive Farm Bill Impact Statement*, *supra* note 152 at 204.

subsidy administration, for example, the statutory obligations reinforce somewhat arbitrary divisions even within the agency itself. As Michael Pollan stated, these internal divides require the agency to regulate at cross-purposes with itself.¹⁹⁵ Administrative law serves as a further limitation on agency discretion.¹⁹⁶ Rachel Barkow in her article, *The Ascent of the Administrative State and the Demise of Mercy*, which argues, among other things, that, “the rise of the administrative state has made unchecked discretion an anomaly in the law, and a phenomenon to be viewed with suspicion.”¹⁹⁷ In other words, the rise of the administrative state is a story of empowering a large government entity to regulate in the public interest while at their same time constricting their decision-making abilities through judicial oversight and narrow statutory interpretation.¹⁹⁸

One of the greatest challenges to the USDA’s ability to implement effective food policy comes from the agency’s dependence on and connections to the industrial entities it is charged with overseeing. Regulatory capture, a term used by public choice economists to describe the situation in which a government regulatory agency implemented to act in the public interest instead advances the economic interests and special interests of the industry it is charged with regulating.¹⁹⁹ This problem is sometimes referred to as “client politics,” which “occurs when most or all of the benefits of a program go to some single,

¹⁹⁵ Michael Pollan, “You Are What You Grow,” *supra* note 2 at 135.

¹⁹⁶ It is important to note that there is no reason to assume greater administrative discretion would yield better policy results in this area. Given some of the other factors identified in this, such as regulatory capture, there are highly plausible arguments to be made that enhanced discretion could in fact contribute further to market distortions and the other problems identified throughout this paper.

¹⁹⁷ Rachel Barkow. *The Ascent of the Administrative State and the Demise of Mercy*. 121 Harv. L. Rev. 1332, 1334 (2008). Available at <http://hllr.rubystudio.com/media/pdf/barkow.pdf>.

¹⁹⁸ *Id.*

¹⁹⁹ See, e.g., Frédéric Boehm, “Regulatory Capture Revisited—Lessons from the Economics of Corruption,” working paper, available at <http://www.icgg.org/downloads/Boehm%20-%20Regulatory%20Capture%20Revisited.pdf>.

reasonably small interest (and industry, profession, or locality) but most or all of the costs will be borne by a large number of people (for example, all taxpayers).”²⁰⁰

A number of charges of regulatory capture at the USDA were made in the wake of the 2004 mad cow disease scare, when the USDA refused to require industry-wide testing and even went so far as banning a willing beef producer from testing his cattle for the disease.²⁰¹ The Wall Street Journal similarly speculated that industry pressures are responsible for the failure of the USDA under President Obama to require an environmental impact statement to consider the impact of its decision to permit the planting of genetically modified, bioengineered alfalfa.²⁰² Another recurrent complaint about the USDA has been its inability to articulate dietary guidelines that address the severity of the obesity epidemic facing this country given the weight of industry pressure on the agency’s rulemaking process.²⁰³ A recent study by the Harvard School of Public Health observed that the 2010 Dietary Guidelines were a considerable improvement over previous USDA publications, but that they still failed to reflect the scientific consensus about what a healthy diet entails.²⁰⁴ The researchers see this failure as likely related to the role that “powerful food industry groups—the Grocery Manufacturers Association, the

²⁰⁰ James Q. Wilson. *Bureaucracy: What Government Agencies Do and Why They Do It*. Basic Books, pp. 76 (1989).

²⁰¹ Donald G. McNeil Jr., U.S. Won't Let Company Test All Its Cattle for Mad Cow. *The New York Times*, April 10, 2004. See

²⁰² Holman Jenkins, *Let's Restart the Green Revolution: Food prices are up, and output and productivity is falling behind*. Not enough attention is being placed on regulation-induced stagnation. *The Wall Street Journal*, Feb 11, 2011, available at <http://online.wsj.com/article/SB10001424052748703445904576118020915591658.html>.

²⁰³ See, e.g., Marion Nestle, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH*. University of California Press; 2 edition (October 15, 2007).

²⁰⁴ The Nutrition Source: New U.S. Dietary Guidelines: Progress, Not Perfection. Harvard School of Public Health, available at <http://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/dietary-guidelines-2010/index.html>; Marion Nestle, The 2010 Dietary Guidelines: Enjoy your food, but eat less!, *Food Politics* blog, Jan. 31, 2011, available at <http://www.foodpolitics.com/2011/01/the-2010-dietary-guidelines-enjoy-your-food-but-eat-less/>.

Sugar Association, the National Milk Producers Federation, and the National Cattleman's Beef Association, among them," play during the USDA's scientific review process and during public hearings.²⁰⁵

With respect to commodity subsidies, the conflict of interest extends past the simple fact that a considerable number of USDA employees depend on the existence of subsidies for their own jobs. To the extent that the USDA has discretion over the administration and delivery of commodity subsidies, industry representatives likewise have a considerable role in influencing agency determinations, both during public hearings,²⁰⁶ through the submission of industry-funded findings, and through wide-scale media campaigns, such as the rather infamous Sweet Surprise campaign of the Corn Refiners Association.²⁰⁷ Because representatives from the USDA regularly have the opportunity to partake in the drafting of Farm Bill legislation and occasionally appear before Congress regarding its authorizing statutes, their willingness to testify adversely to the interests of their clientele, particularly when their agency's jobs are potentially at stake, creates a conflict of interests that jeopardizes the possibility that the Department of Agriculture will ever support food policies that serve the broader public's nutritional needs.

B. Congressional Committees & the Illusion the Farm Bill only Affects Farming

There are a number of structural features of Congress that help explain why this enormously unpopular bill's remarkable persistence. The corn subsidy served a useful public purpose when it was first passed, but, as I alluded to previously, the process of

²⁰⁵ Id.

²⁰⁶ See, e.g., Ben Tucker, "Can't Keep 'Em Down on the Farm Bill," The College Hill Independent, available at http://students.brown.edu/College_Hill_Independent/?p=4660 (on the lack of broad public participation at public hearings).

²⁰⁷ High Fructose Corn Syrup Health and Diet Facts, Part of "Changing the Conversation about High Fructose Corn Syrup", a public relations and advertising campaign paid for by the Corn Refiners Association (CRA), available at www.SweetSurprise.com.

legislative drift has allowed subsidy administration to develop in one direction while the background economy develops in another. However, the Farm Bill presents a special case. This bill has to be actively reauthorized by Congress every five years, so the simple process of changing background conditions cannot fully explain what's going on. There is a great deal of political inertia surrounding the Farm Bill, in part because its deleterious effects have not been overwhelmingly borne by a single interest group, but also because the bill's relative unpopularity among policymakers has never been replicated before the larger population sufficiently to catalyze its repeal or to stop its recurring reauthorization. This Part identifies several structural aspects of the U.S. legislative process that enable the type of interest group overrepresentation that is the topic of Part C. The breakdown that leads to the continued legislative renewal of the Farm Bill every five years actually reveals a deeply entrenched and unnecessary corporate welfare regime, and in many ways reveals how out of touch our current political system is at responding to the problems facing our country. Not only can Congress not address problems, it cannot even stop actively funding them once it has become clear that is what it is doing.

The congressional committee system contributes to the problem in several ways as well. Like the fragmentation, compartmentalization, and balkanization problems affecting the agencies charged with the administration of Farm Bill legislation, Congressional committees face the same coordination problems and arbitrary divisions of responsibility. On top of this, a single committee is often charged with drafting and revising the majority of the Farm Bill. Although eventually the full legislative body will have a chance to propose revisions and ultimately vote on the bill, the interests of the drafting committee, typically the agricultural committee with the strongest economic ties to farm states, tend to

predominate through to the bills' final versions.²⁰⁸ These problems are both rendered more significant by the fact that the Farm Bill is largely viewed—by both representatives and their constituents alike—as purely agricultural legislation and not, more accurately, as affecting the health, welfare, and environmental interests of a broad cross-section of Americans.

The Senate, for example, has separate committees for Agriculture, Nutrition and Forestry; Appropriations; Energy and Natural Resources; Environment and Public Works; Health, Education, Labor and Pensions.²⁰⁹ Although these committees, and certainly others not listed here, all have interests deeply connected to a broad conception of food and agricultural policy, Farm Bill legislation is entrusted to the Agricultural Committees.²¹⁰ The broken Senate rules and the absence of debate on the Senate floor make this deliberative and representative failure almost absolute.

The process of assigning Farm Bill legislation to the House and Senate agricultural committees, compounded by popular misunderstandings about the bills effects, effectively shields the bill from the kind of debates that the United States needs to be having. Michael Pollan has expressed this concern quite powerfully:

“[Y]ou would think that the farm-bill debate would engage the nation’s political passions every five years, but that hasn’t been the case. If the quintennial antidrama of the ‘farm-bill debate’ holds true to form this year, a handful of farm-state legislators will thrash out the mind-numbing details behind closed doors, with virtually nobody else, either in Congress or in the media, paying much attention. Why? Because most of us assume that true to its name, the farm bill is about ‘farming,’ an increasingly quaint activity that involves no one we know

²⁰⁸ See Farm Bill (Cmte Passed), U.S. Senate Committee at Agriculture, Nutrition & Forestry, available at <http://ag.senate.gov/site/fbcmtepassed.html>.

²⁰⁹ See United States Senate Committees Home, available at http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm.

²¹⁰ *Id.*; Farm Bill Press Releases, House Committee on Agriculture, available at <http://agriculture.house.gov/singlepages.aspx?NewsID=1227&LSBID=23&RBSUSDA=T>.

and in which few of us think we have a stake. This leaves our own representatives free to ignore the farm bill, to treat it as a parochial piece of legislation affecting a handful of their Midwestern colleagues. Since we aren't paying attention, they pay no political price for trading or even selling their farm-bill votes. The fact that the bill is deeply encrusted with incomprehensible jargon dating back to the 1930s makes it almost impossible for the average legislator to understand the bill should he or she try to, much less the average citizen. It's doubtful this is an accident."²¹¹

Structural features of Congress like the committee system have made it possible for private sector lobbyists to target fewer representatives and to frame their interests more narrowly, far more narrowly than the scope of issues in the public interest affected by agricultural legislation. In March of 2011, for example, the House Agricultural Committee, in an effort to reduce the Congressional budget, endorsed a letter supporting cuts in the Supplemental Nutrition Assistance Program, which helps low-income Americans purchase food.²¹² The Committee would rather cut in SNAP rather than cut automatic subsidies to farms, despite the fact that food prices are expected to rise by as much as 4% by the end of 2011 and that the highest number of Americans in decades have been struggling to afford food.²¹³

C. Lobbyists, Interest Groups, & the Illusion of the Public Choice Doctrine

As outlined in the preceding paragraphs, the breadth of issues impacted by Farm Bill subsidies fits somewhat awkwardly with the fact that such a limited subdivision of Congress exercises such a disproportionate influence over the bill's drafting. The Agricultural Committee is dominated by members of Congress from farm states carries

²¹¹ Michael Pollan, "You Are What You Grow," in *MANIFESTOS ON THE FUTURE OF FOOD & SEED*, ed. Vandana Shiva, South End Press, Cambridge, MA at 137-38 (2007).

²¹² Committee on Agriculture, U.S. House of Representatives, Press Release: Agriculture Committee Adopts Budget Letter, available at <http://agriculture.house.gov/press/PRArticle.aspx?NewsID=1340>.

²¹³ Tim Feinholz, Ag Committee Supports Cuts to Food Assistance, Not Farm Subsidies, *The National Journal*, available at <http://nationaljournal.com/ag-committee-supports-cuts-to-food-assistance-not-farm-subsidies-20110321>.

serious implications for the interest group politics of the Farm Bill. There is no traditional partisan split that sustains the agricultural subsidy regime, and as I have described elsewhere, subsidies have vocal critics on both sides of America's political divide. The problem is, rather, one of legislative and regulatory capture,²¹⁴ and there is considerable evidence that private farm sector lobbying affects both Republicans and Democrats alike. As Tim Feinholz reported, House Agricultural Committee Chairman Frank Lucas (R-OK) has reported \$445,714 in political contributions from the agricultural industry over the course of his career, and ranking Democrat Collin Peterson (D-MN) has reported \$809,097 in agricultural sector donations.²¹⁵

According to a public choice vision of legislation, Congressional action should be expected to correct for market externalities and market failures and to establish corrective measures within areas of activities unreachable by market forces. As a practical matter, costs that are dispersed over large areas or disaggregated groups of individuals are often uncoordinated and receive disproportionate representation when compared to the cohesive, well-defined economic interests. Farming legislation is no exception. In fact, the Farm Bill offers a powerful illustration of the limits of this public choice view within our current legislative system. The long-term environmental harms and scattered but growing incidence of obesity have costs that far outweigh the benefits we derive from subsidizing corn production, but rather than act as a rational economic actor to correct for these externalities, Congress inexplicably continues to actively fund and perpetuate them.

²¹⁴ Matt Yglesias, Embracing Regulatory Capture, Jan. 4 2011, available at <http://yglesias.thinkprogress.org/2011/01/embracing-regulatory-capture/> (describing the process of "regulatory capture" affecting Congress, a phenomenon "wherein private interests seize control of the policymaking apparatus for their own interests").

²¹⁵ Id.

Interest groups, community organizations, nonprofits, and other forms of collective action are necessary for these more diffuse and dispersed interests to counteract the economic incentives faced by members of the Senate and the House of Representatives. Concerted industry lobbying and the absence of a concentrated public interest lobbying group to counteract that influence have prevented the public choice process from proceeding as adherents to this view suppose.

As Barbara Atwell wrote, “One of the likely obstacles to reforming America's weight problem is the food industry itself. The politics of food cannot be underestimated.”²¹⁶ Lobbying and our system of privately funded political campaigns are essential to any attempt at an explanation for America's inability to legislate, particularly regarding issues such as corn subsidies where the public welfare interests run counter to a concentrated and articulate corporate interest. Nutrition expert and NYU Professor Marion Nestle made a similar observation during a recent interview with NPR: “The other source of corruption, of course, is the way we fund election campaigns. As long as corporations are funding the campaigns of our congressional representatives, we're not going to get laws passed that favor public health. Our laws are going to continue to favor corporate health.”²¹⁷

Without even needing to allege that any illegal corruption transpired or that *quid pro quo* campaign contributions were exchanged for the continued support of subsidy payments, for example, the problems inherent in this design nonetheless disrupt public choice and effective representation in the public interest. Scholars have noted that even

²¹⁶ Barbara L. Atwell, *Obesity, Public Health, and the Food Supply*, 4 Ind. Health L. Rev. 3, 13 (2007) (citations omitted).

²¹⁷ Can Wal-Mart Change America's Eating Habits?, Interview with Marion Nestle, National Public Radio, Jan. 20, 2011, available at <http://www.npr.org/2011/01/20/133091250/Can-Wal-Mart-Change-Americas-Eating-Habits>.

legally permissible forms of lobbying influence undermine the legitimacy of our democratic representative institutions.²¹⁸ The perception of corruption likewise undermines democratic trust and has been cited as a major reason to reform existing campaign finance restrictions²¹⁹ and served as a compelling state interest in the Supreme Court's First Amendment since *Buckley v. Valeo*.²²⁰ The improved access that lobbyists have to legislators, the financial dependencies that legislators develop on their largest campaign contributors, and the subtle ways in which contributions foster more favorable impressions among legislators together undermine the representative process that serves as the premise of our legislative system of government. Absent these influences, it would be difficult to comprehend how harmful, unpopular legislation like the commodity subsidies within the Farm Bill would persist or even come to pass in the first place.

Lobbying from agricultural companies is considerable. When taken alongside the Committee system and the large influence that several Midwestern representatives exert over agricultural policy, even modest industry contributions when properly targeted can have a significant effect. At the time the 1973 deregulatory move within agriculture was spearheaded by then Secretary of Agriculture Earl Butz, primarily benefitting a handful of large companies such as Cargill and ADM, which came to dominate the HFCS industry.²²¹ As Chip Kraffoff wrote, "it wasn't precisely a windfall, since ADM had done a great deal to

²¹⁸ See, e.g., Laurence Lessig, *Democracy After Citizens United*, Boston Review Sept./Oct. 2010, available at <http://bostonreview.net/BR35.5/lessig.php>.

²¹⁹ Jacob Sullum, *The Appearance of Corruption*, Reason Magazine, Dec. 2010, available at <http://reason.com/archives/2010/11/30/the-appearance-of-corruption> (noting that John McCain made eliminating the appearance of corruption a part of his 2000 campaign and when advocating for the eventual passage of the McCain-Feingold Bipartisan Campaign Reform Act of 2002, stating for example, "It's the appearance that's just as important.").

²²⁰ *Buckley v. Valeo*, 424 U.S. 1 (1975) (holding that society's interest in preventing "corruption and the appearance of corruption" outweighed the limits on free expression created by restrictions on campaign contributions and expenditures); see also, Thomas Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Commentary 127 (1997), available at <http://www.wellesley.edu/Polisci/tb/finlaw.html>.

²²¹ The National Family Farm Coalition (NFFC), *King Corn Fact Sheet*, *supra* note 43 at 2.

engineer this outcome.”²²² It is no coincidence that Butz’s free market rhetoric and admonition to “get big or get out” aligned so closely with the interests of the nation’s largest commodity producers.²²³ Cargill and ADM had actually advocated publicly with Butz and the Farm Bureau for selective deregulatory policies and liberalized international trade policies.²²⁴ Nor is it surprising that the market share of the largest industrial growers were the primary beneficiaries of governmental subsidies and saw persistent increases in market share since their implementation,²²⁵ despite a major purported rationale for the subsidy being to support small-scale, family-owned farms.²²⁶ Consider the following graph from the USDA Economic Research Service, indicating that commercial farms, constituting only 12% of farms in the U.S., receive an impressive and disproportionate 62% of government agricultural payments:

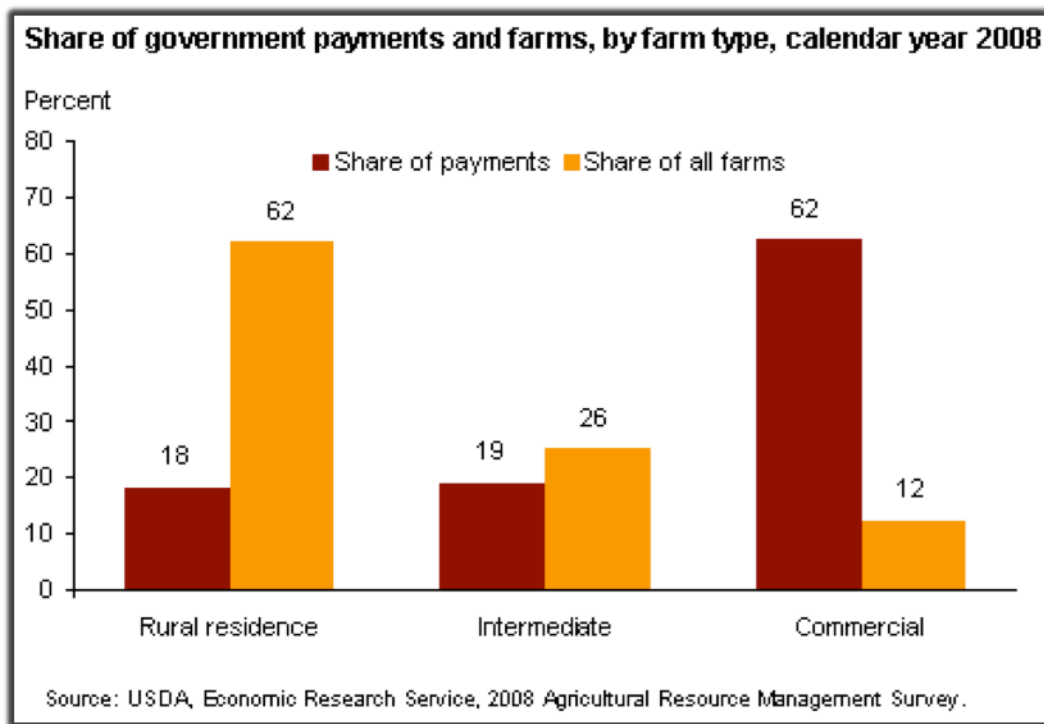
²²² Chip Krakoff, *Starvation, Obesity, and Corporate Welfare: Archer Daniels Midland and U.S. Policy*, Emerging Markets Outlook, Oct, 13, 2010, available at <http://www.emergingmarketsoutlook.com/?p=1469> (describing ADM’s electioneering activities from the late 1960s through 2009).

²²³ *Id.* The following passage is instructive and suggests ADM did far more than issue public statements favoring the administration’s deregulatory policies: “During the Watergate Investigation, Special Prosecutor Archibald Cox indicted then-ADM CEO Dwayne Andreas for giving \$100,000 in illegal contributions to Hubert Humphrey’s 1968 Presidential campaign. But Andreas was nothing if not bipartisan. Richard Nixon’s secretary Rose Mary Woods, testified that during Nixon’s 1972 campaign Andreas handed her an envelope containing \$100,000 in \$100 bills. Between 1975 and 1977 Andreas gave \$72,000 in ADM stock to the children of David Gartner, senator Humphrey’s chief of staff at the time, whom President Jimmy Carter in 1977 named to head the Commodity Futures Trading Commission (he was later forced to resign when the details of the ADM gift came to light).”

²²⁴ See *Id.*; NFFC, King Corn Fact Sheet, *supra* note 43 at 2; Tom Philpott, The 2007 Farm- and Food-Bill, Oct. 27, 2006, available at <http://www.foodfirst.org/backgrounders/fall2006>.

²²⁵ Alan Bjerga, *Most U.S. Farm Subsidies Go to 10% of Recipients, Group Says*, Bloomberg Businessweek (May 4, 2010), available at <http://www.businessweek.com/news/2010-05-04/most-u-s-farm-subsidies-go-to-10-of-recipients-group-says.html>; Chuck Hassebrook, Cap the Subsidies to Big Farms, *supra* note 11 (“When the Center for Rural Affairs analyzed Agriculture Department spending, we found that the U.S.D.A. spent twice as much subsidizing the 20 largest farms in each of 13 leading farm states as it spent on rural development (business and entrepreneurial development, housing and infrastructure)”)

²²⁶ See, e.g., *id.* (“Some elected officials who crow the loudest about cutting unnecessary spending seem to be among the most vociferous defenders of unlimited subsidies to the nation’s largest farms. The hypocrisy on this issue, however, is not limited to Republican budget hawks. Many Democrats who wrap themselves in rhetoric about saving the little guy are equally timid when it comes to reigning in mega-farm subsidies.”).



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Contributions from major agricultural interests have shown little sign of abating. According to the nonprofit Public Campaign, “Over the past 12 years, the industry has spent \$1.5 billion on lobbying and campaign contributions at the federal level.”²²⁸ As Laurence Lessig recently noted in a talk calling for reforms to America’s campaign finance system, “companies that build on corn spend millions of dollars to continue to get government subsidies for corn.”²²⁹ Other researchers have observed that it is not only growers, but also food producers and manufacturers who depend on cheap and abundant corn-derived products such as HFCS who are lobbying for the continuation of subsidies that prevent the

²²⁷ Farm and Commodity Policy: Government Payments and the Farm Sector: Who Benefits and How Much?, USDA Economic Research Service available at <http://www.ers.usda.gov/Briefing/Farmpolicy/gov-pay.htm>.

²²⁸ Adam Smith, Campaign Cash, It’s What’s for Dinner, Public Campaign, Jan. 11, 2011, available at <http://www.publiccampaign.org/blog/2011/01/27/campaign-cash-its-whats-for-dinner>

²²⁹ Laurence Lessig, Citizens: The Need and the Requirements—Our Nation Desperately Needs Citizens, *supra* note 84.

actual costs of agricultural production from being borne by businesses.²³⁰ ADM, a major recipient of the private benefits conferred through corn subsidies,²³¹ has continued to donate generously to a number of Presidential and Senatorial campaigns and sponsored the 2008 Democratic National Convention.²³² According to ADM's website on corporate responsibility, the company's stated philosophy on political contributions is the following:

“ADM and ADMPAC, a political action committee funded by our employees' voluntary contributions, therefore support candidates for political office and organizations that share our pro-growth vision, our aspirations for the future of global agriculture, and our commitment to the people who depend on it for their lives and livelihoods. We strongly believe that this political activity is in the best interests of our stockholders, customers and employees.”²³³

In 2010, ADM Corporate gave \$340,750 in federal and state campaigns, and ADMPAC gave another \$183,000.²³⁴

Subsidies are not the only aspect of farming legislation that lobbyists have taken interest in, and other reform efforts that would help correct the imbalances resulting from these price supports have been similarly impeded. Lessig also observed that the sugar industry has taken an approach that unwittingly complements the corn lobby to the detriment of the public's health by seeking tariffs and legislation that will keep the cost of sugar artificially high, a practice that helped entrench HFCS in the American diet. The Washington Post reported that “[d]uring the 2004 election cycle, two Florida sugar

²³⁰ See, e.g. Barbara L. Atwell, *Obesity, Public Health, and the Food Supply*, 4 Ind. Health L. Rev. 3, 13 (2007) (citations omitted) (Citing Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales, Obesity and Justice in America*, supra note 105 at 1792-94).

²³¹ See James Bovard, Archer Daniels Midland: A Case Study in Corporate Welfare, (Sept. 26, 1995), supra note 106.

²³² Chip Krakoff, *Starvation, Obesity, and Corporate Welfare: Archer Daniels Midland and U.S. Policy*, supra note 219.

²³³ ADM: 2010 Corporate Responsibility Update - U.S. Political Contributions, available at http://www.adm.com/en-US/responsibility/2010CR/political_spending/Pages/default.aspx (last checked April 5, 2011).

²³⁴ Id.

companies gave a total of \$925,000 to election coffers.”²³⁵ Consider the following passage from Barbara Atwell’s paper on the healthcare costs of American food policy:

“The food industry has also been proactive in its efforts to ensure that the tobacco litigation experience will not be repeated in the food industry. . . . Lobbying is taking place to urge states to enact laws that prevent lawsuits for personal injuries related to obesity. These “commonsense consumption” laws would place accountability for obesity on the consumer, making it more difficult to sue food manufacturers. . . . A number of advocacy groups, in particular, the National Restaurant Association, have advocated for this legislation.”²³⁶

“The omnibus nature of the bill can create broad coalitions of support among sometimes conflicting interests for policies that individually might not survive the legislative process.”²³⁷

There is no suggestion that the campaigning and lobbying actions of ADM or others described in the preceding paragraphs are illegal. The example provided by ADM simply serves to explain why democratically preferred and public interested policies have proven unattainable: legislatures and other political actors are financially beholden to the very interests the purport to regulate. Because both parties suffer from this kind of financial dependencies, combined with voters’ interest in maintaining solidarity with their parties to prevent a worse alternative from being elected, renders effective mobilization of the electorate elusive. This should serve to illustrate what I meant in the heading of this

²³⁵ Big Sugar, The Washington Post, (Apr. 16, 2005) <http://www.washingtonpost.com/wp-dyn/articles/A57782-2005Apr15.html>

²³⁶ Barbara L. Atwell, *Obesity, Public Health, and the Food Supply*, 4 Ind. Health L. Rev. 3, 13 (2007)(Citing Forest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 Alb. L.J. Sci. & Tech. 153 (2004); Lorraine M. Buerger, *The Safe Games Illinois Act: Can Curbs on Violent Video Games Survive Constitutional Challenges?*, 37 Loy. U. Chi. L.J. 617, 659-60 (2006) (focusing on the dangers of violent video games, the author also notes that video games may contribute to obesity and that the commonsense consumption laws’ focus on individual responsibility makes legal recourse difficult); Jason A. Smith, *Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity*, 28 U. Ark. Little Rock L. Rev. 443, 452-54 (2006) (arguing that individuals should be personally responsible for poor eating choices)).

²³⁷ Renée Johnson and Jim Monke, What is the Farm Bill?, Congressional Research Service Report for Congress (Dec. 10, 2010), available at <http://www.nationalaglawcenter.org/assets/crs/RS22131.pdf>.

Section. The public choice model and median voter theories of politics are not operating in the United States.

Conclusion

The combined direct and indirect costs of the corn subsidy are astronomical. The average annual tax expenditures on corn supports is nearly \$5 billion for the past 15 years, with a total of over \$73.8 billion.²³⁸ A disproportionate share of that went to the largest commercial producers²³⁹ and went on to subsidize a number of products of “dubious social utility,” including ethanol, HFCS, and CAFO animal products.²⁴⁰ The Farm Bill as it currently exists also exacerbates America’s epidemic of diabetes, obesity, and coronary diseases, contributes massively to healthcare costs, lost productivity, and other inefficiencies associated with these conditions. The legislation also indirectly contributes to increases in the price of fossil fuels, adds deferred costs in the form of a number of irreversible environmental harms, including soil erosion, water pollution, global warming, and the development of antibiotic resistant bacteria associated with the CAFO farms that corn subsidization has rendered profitable. The costs of this legislation also include the increased incidence of starvation, immigration, and political instability that are produced internationally, all of which over time impose additional costs on U.S. taxpayers. The combined costs are massive.

The case for regulation here is far stronger than in areas where (forgive the pun) the legislature has not already occupied the field. The problem is not merely that the U.S.

²³⁸ Corn Subsidies in the United States totaled \$73.8 billion from 1995-2009, Environmental Working Group, *supra* note 89.

²³⁹ Farm and Commodity Policy: Government Payments and the Farm Sector: Who Benefits and How Much?, USDA ERS, *supra* note 224.

²⁴⁰ Tom Philpott, Why are we propping up corn production again?, *supra* note 96.

government should intervene in a failed market to reduce the externalities or to stabilize commodity prices; the problem is that the government actively funds the continuation of those very same externalities it should be limiting, and a handful of private entities pocket the benefits of those public expenditures. As Mark Bittman phrased it, “The point is that this money, which is already in the budget, could encourage the development of the kind of agriculture we need, one that prioritizes caring for the land, the people who work it and the people who need the real food that’s grown on it.”²⁴¹

Because of the conflicts of interest at the core of our political institutions, these near-universally reviled market distortions have grown entrenched and, practically speaking, have become part of the background way things are. This state of affairs prompted Hanson, Benforando, and Yousef to remark that, “policymakers tend to treat [subsidies] as part of the unseen natural situation, and thus tend to be blind to their health effects and, more specifically, their contribution to the obesity epidemic.” The same could be said with respect to the environmental, socioeconomic, and global labor and hunger crises that this legislation to some degree helps prop up. The perverse incentives perpetuated by current commodity subsidy programs are perhaps all that can be expected until Americans confront the structural problems and perverse incentives that constitute the legislative process in the United States.

²⁴¹ Mark Bittman, Don’t End Agricultural Subsidies, Fix Them, NY Times Opinion Pages (Mar. 1, 2011), available at <http://opinionator.blogs.nytimes.com/2011/03/01/dont-end-agricultural-subsidies-fix-them/>.